

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



**74-1551**

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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 74-1551**

**B  
P/5**

PETER F. CLARK, as President of Ice Cream Drivers and Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, ANTHONY IORIO, as President of Milk Drivers and Dairy Employees Union Local 680, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, PETER F. CLARK, EMANUEL PARISH, ANTHONY CARLINO, RICHARD MASCUCH, ANTHONY IORIO and EDWARD HUTNIK, as Trustees of and on behalf of all of the Trustees of Ice Cream Industry-Drivers and Ice Cream Employees Union Pension Fund, a pension trust fund,

*Plaintiffs-Appellees-Appellants,*

—against—

KRAFTCO CORPORATION,

*Defendant-Appellant-Appellee.*

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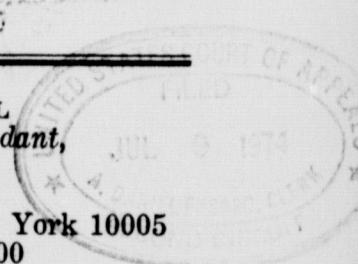
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**JOINT APPENDIX**

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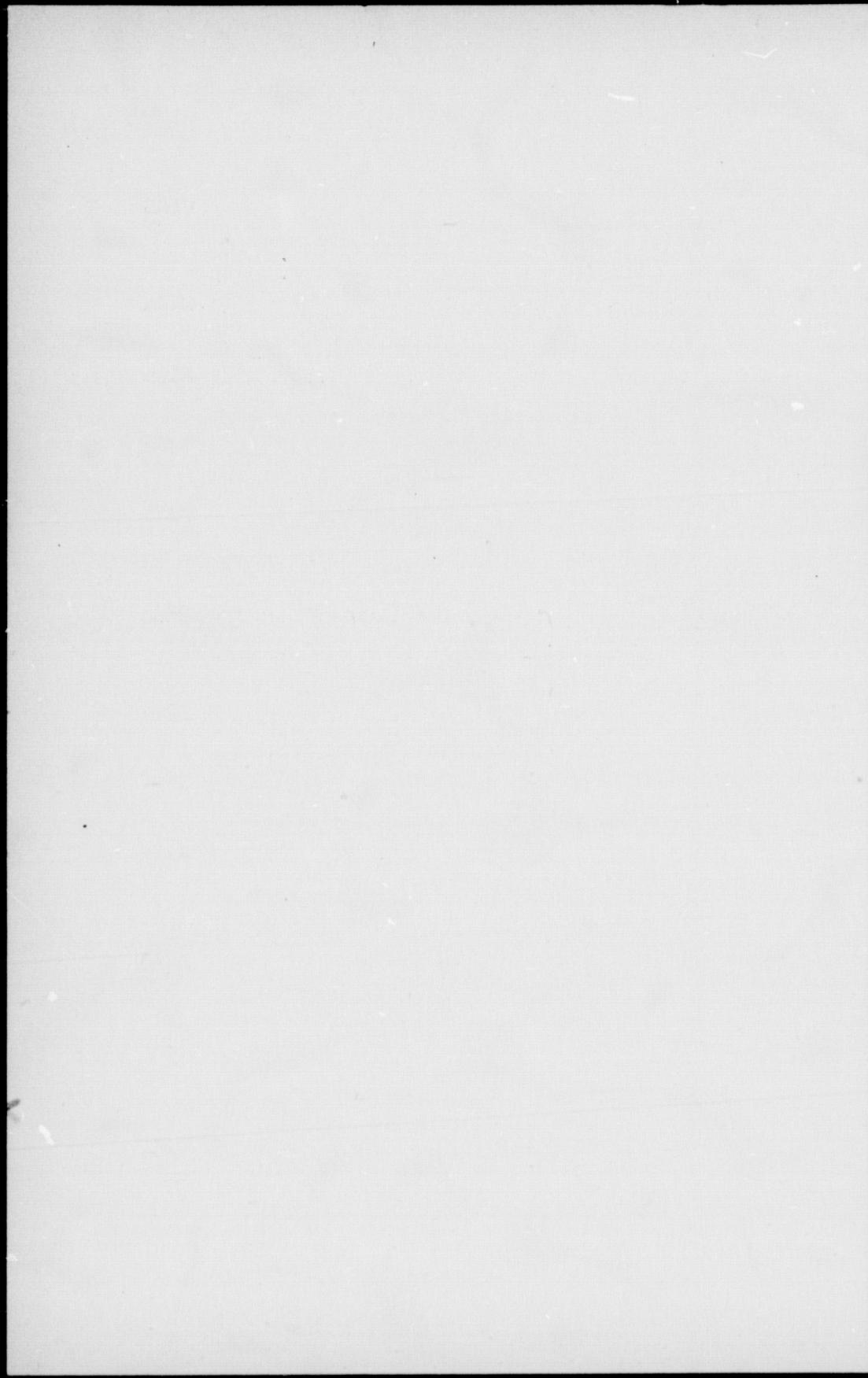
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**Relevant Docket Entries**

**CIVIL DOCKET 70 CIV. 1246**

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DATE	PROCEEDINGS
Mar. 27-70	Filed complaint, issued summons.
Apr. 9-70	Filed Notice to take Deposition upon oral examination.
Jul. 17-70	Filed ANSWER of Kraftco Corp. to complaint.
Dec. 16-70	Filed Affidavits in opposition and counter-statement under Gen. Rule 9(g).
Dec. 16-70	Filed Depositions taken by defendant Kraftco Corp. of Jack M. Elkin, Thomas W. Fitzgerald and Irving McDougall, all officers or employees of Martin E. Segal Co.
Feb. 26-71	Filed affidavit of Peter Clark (for plaintiffs) in response to certain questions raised by Court.
Feb. 26-71	Filed affidavit of Lawrence McGinley (for plaintiff Union Local 680) in support of plaintiffs' motion for summary judgment.
Feb. 26-71	Filed plaintiffs' affidavit and notice of motion for summary judgment.
Feb. 26-71	Filed OPINION # 37435—Summary judgment is denied. The appraisal determination is vacated and remanded—Settle order accordingly—Tyler, J. m/n

*Relevant Docket Entries*

DATE	PROCEEDINGS
Mar. 25-71	Filed order that plaintiff's motion for summary judgment is denied, the determination of the Segal Co. with respect to the impact upon the Pension Fund of the Breyer-Newark closing be and hereby is vacated. Ordered that the issue be remanded to the Segal Co. to make the actuarial determination contemplated by Breyer Agreement, such determination to be made under the following terms and conditions: Tyler, J.
Apr. 22-71	Filed plaintiffs' notice of appeal to USCA from order of 3-25-71—Mailed copies to Sullivan & Cromwell; Schacter & Wiseman; Solomon & Rosenbaum.
Feb. 3-72	Filed true copy from the USCA; Ordered that motion dated 7-9-71 to dismiss the appeal from the U./S District Court for lack of jurisdiction be and it is granted. Clerk. Mailed Notice. (Opinion attached.)
Dec. 5-73	Before Lumbard, C.J., Non-Jury Trial begun.
Dec. 6-73	Trial Cont'd and Concluded, Decision Reserved.
Feb. 20-74	Opinion # 40377: The plaintiffs are entitled to recover from defendant Kraftco the sum of 576,700 on behalf of the Ice Cream Ind. Drivers and Ice Cream Employees Union

*Relevant Docket Entries*

DATE	PROCEEDINGS
	Pension Fund; Etc. Judgment for the plaintiffs shall be entered. Lumbard, C.J. (mailed notice)
Feb. 22-74	Filed Judgment: #74,197: That plaintiffs Peter F. Clark, et al. have judgment against defendant Kraftco Corp. in the amount of \$576,700.00, with pre-judgment interest at 7 1/4% per annum from 11/2/68 through 2/15/69; at 7 1/2% per annum from 2/16/69 through 8/31/72; and at 6% per annum from 9/1/72 to date of judgment, without costs nor attorney's fees for either party. Lumbard, C.J., (M/N)
Mar. 28-74	Filed defendant's motion [made Mar. 4] for Amended Judgment or for New Trial.
Mar. 28-74	Filed Memo Endorsed; Denying Motion for Amended Judgment or for New Trial. So Ordered, Lumbard, C.J., Signed 3/28/74 entered 3/29/74
Apr. 15-74	Filed notice of appeal by defendant Kraftco Corp. from order and opinion of U.S.D.C. dated Feb. 19-74, the judgment entered Feb. 22-74, and the order dated: Mar. 28-74. m/n.
Apr. 26-74	Filed plaintiff's Notice of Appeal to U.S.C. of Appeals from Opinion and Order of 2/19/74 and Judgment of Feb. 22, 1974. (M./N.)

**Complaint**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246

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[SAME TITLE]

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The plaintiffs by Cohen and Weiss, their attorneys, complaining of the defendants allege:

1. Jurisdiction of this Court arises out of and is based upon Section 301 of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. 185, and also arises out of and is based upon 28 U.S.C. 1337.
2. Plaintiff, Peter F. Clark, is President of Ice Cream Drivers and Employees Union Local 757, which is an unincorporated association and is a labor organization within the meaning of Section 301 of the Labor-Management Relations Act of 1947 as amended. The regular office and place of business of plaintiff Ice Cream Drivers and Employees Union Local 757 is located at 265 West 14th Street, in the City, County and State of New York.
3. Plaintiff, Lawrence W. McGinley, is President of Milk Drivers and Dairy Employees Union Local 680, which is an unincorporated association and labor organization within the meaning of Section 301 of the Labor-Management Relations Act of 1947 as amended. The regular office and place of business of plaintiff Milk Drivers and Dairy Employees Union Local 680 is located at 535 High Street, in the City of Newark, State of New Jersey.

*Complaint*

4. The aforesaid labor organizations will be hereinafter referred to as the Unions.

5. Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Fund is a pension trust fund established pursuant to and in accordance with the requirements of Section 302 of the Labor-Management Relations Act of 1947 as amended, 29 U.S.C. 186, by the Unions and Kraftco and other employers of members of the Unions, and will be hereinafter referred to as the Pension Fund. The regular office and place of business of the Pension Fund is located at 250 West 57th Street, City, County and State of New York.

6. A copy of the Trust Agreement governing the Pension Fund is annexed hereto marked Exhibit A.

7. Plaintiffs, Peter F. Clark, Emanuel Parish, Anthony Carlino, Lawrence W. McGinley, Anthony Iorio and Edward Hutnik constitute all of the Trustees of the Pension Fund who are the employee representatives duly designated in accordance with the Trust Agreement.

8. Defendants, Herbert B. Armel, Emer C. Flounders, Harvey J. Frem, Andrew F. Gruninger, Jr., Austin Puvo-gel, Louis Schachter and H. Schuyler Todd, constitute all of the Trustees of the Pension Fund who are the employer representatives duly designated in accordance with the Trust Agreement.

9. Defendant, Kraftco Corporation, is an employer engaged in an industry affecting commerce within the meaning of Section 301 of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. 185, and is an employer of

*Complaint*

employees represented by the Unions, and is a party to the Trust Agreement and is obligated to make contributions to the Pension Fund in accordance with the requirements of the Trust Agreement and in accordance with the written collective bargaining agreements duly entered into between the said defendant and the Unions.

10. The employees of Kraftco covered by the aforesaid agreements are covered by the Pension Fund and have rights and claims thereunder.

11. Kraftco Corporation prior to April 17, 1969, was known as National Dairy Products Corporation. All references to Kraftco Corporation herein will also include National Dairy Products Corporation and Sealtest Foods Division, formerly a trade division of National Dairy Products Corporation and presently a trade division of Kraftco Corporation. The said defendant will be herein-after referred to as Kraftco.

12. Kraftco has an office and regular place of business at 260 Madison Avenue, in the City, County and State of New York.

13. Kraftco is a foreign corporation organized and existing under and pursuant to the laws of the State of Delaware.

14. Copies of the contracts in effect between the Unions and Kraftco from May 1, 1965 until April 30, 1968, are annexed hereto as Exhibits B (Local 757) and C (Local 680).

15. Copies of the contracts in effect between the Unions and Kraftco from May 1, 1968, until April 30, 1971, are

*Complaint*

annexed hereto as Exhibits D (Local 757) and E (Local 680).

16. On or about April 25, 1968, a separate and distinct contract was entered into between the Unions and Kraftco pertaining to the closing of the ice cream factory operated by Kraftco at Newark, New Jersey, known as the Breyer plant. A copy of the said contract is annexed hereto as Exhibit F. The said contract will be hereinafter referred to as the Breyer Plant Contract.

17. The Breyer Plant Contract provided, *inter alia*, that Kraftco pay to the Pension Fund the sums determined by the consultants to the Pension Fund to be the extent to which the Pension Fund had been adversely affected as a result of the discontinuance of operations by Kraftco at its Breyer Plant at Newark. The said contract further provided that the decision of the consultants be final and binding on the parties.

18. In accordance with the terms and conditions of the Breyer Plant Contract, Martin E. Segal & Co. Inc., the pension consultants of the Pension Fund, made a determination, on or about October 21, 1969, to the effect that the Pension Fund had been adversely affected as the result of the discontinuance of operations by Kraftco at the Breyer plant and that a deficit of \$978,100.00 had been incurred by the Pension Fund as a result of the closing of the Breyer plant.

19. Upon the making of the aforesaid determination by the consultants to the Pension Fund, the plaintiffs duly demanded of the defendant, Kraftco, that the said sum of

*Complaint*

\$978,100.00 be paid by Kraftco to the Pension Fund, but Kraftco has failed and refused to make such payment.

20. Plaintiffs herein sue on behalf of the Pension Fund as well as on behalf of the Unions by reason of the fact that the Pension Fund is the third party beneficiary of the Breyer Plant Contract insofar as the aforesaid obligation to pay the said sum of \$978,100.00 is concerned.

21. Plaintiffs duly requested the defendants other than Kraftco to join in this action as Trustees of the Pension Fund, but the said defendants have failed and refused to become parties plaintiffs herein, and have refused to join with the plaintiffs in authorizing the Pension Fund to bring this action.

22. Because of the failure and refusal of the said defendants to become plaintiffs in this action, and because the aforesaid sum of \$978,100.00 due from defendant Kraftco to the Pension Fund is a valuable asset of the Pension Fund, which should not be wasted but which should be recovered by the Pension Fund without delay, the plaintiffs have joined the defendants other than Kraftco as parties defendants herein.

WHEREFORE, the plaintiffs demand judgment

(a) That the defendant Kraftco Corporation pay to the plaintiffs as Trustees of Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Fund the sum of \$978,100.00, together with interest thereon from the 21st day of October, 1969, and together with the reasonable attorneys' fees incurred in the prosecution of this

*Complaint*

action, and together with the costs and disbursements of this action.

(b) Granting to the plaintiffs such other, further and different relief as may be just and proper.

COHEN AND WEISS

By SAMUEL J. COHEN  
(A Member of the Firm)

Attorneys for Plaintiffs  
Office and P. O. Address  
605 Third Avenue  
New York, N. Y. 10016  
MU 2-6077

Dated: New York, N.Y.  
March 25, 1970.

**Answer of Defendant Kraftco Corporation**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246 H.R.T.

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[SAME TITLE]

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Defendant Kraftco Corporation, by its attorneys, Sullivan & Cromwell, for its Answer to the Complaint:

**FIRST DEFENSE**

1. Admits that plaintiffs purport to invoke the jurisdiction of this Court under the statutory provisions cited in paragraph 1, but denies the other averments of paragraph 1.
2. Admits the averments of the first sentence of paragraph 2 and, answering the averments of the second sentence thereof, admits that Ice Cream Drivers and Employees Local 757 ("Local 757") has an office and place of business at 265 West 14th Street in the City, County and State of New York, but denies knowledge or information sufficient to form a belief as to the truth of the other averments of said second sentence.
3. Admits the averments of the first sentence of paragraph 3 and, answering the averments of the second sentence thereof, admits that Milk Drivers and Dairy Employees Union Local 680 ("Local 680") has an office and place of business at 535 High Street in the City of Newark,

*Answer of Defendant Kraftco Corporation*

State of New Jersey, but denies knowledge or information sufficient to form a belief as to the truth of the other averments of said second sentence.

4. Paragraph 4 contains no factual averments and therefore no response is required.

5. Admits that the Ice Cream Industry—Drivers and Ice Cream Employees Unions Pension Trust Fund ("the Pension Fund") was established pursuant to Article III of a written agreement and declaration of trust, dated April 1, 1952 ("the Trust Agreement"), between Local 757 and Local 680 ("the Unions") and employers of members of the Unions, including defendant Kraftco Corporation, that the terms of the Trust Agreement and the Pension Fund comply with the provisions of Section 302 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. § 186, *et seq.*), and that the regular office and place of business of the Pension Fund is located at 250 West 57th Street, City, County and State of New York, but denies the other averments of paragraph 5.

6. Admits that Exhibit A to the Complaint is a copy of the Trust Agreement referred to in paragraph 6 hereof, as amended to January 21, 1970, but denies the other averments of paragraph 6.

7. Admits that Peter F. Clark, Emanuel Parish, Anthony Carlino, Lawrence W. McGinley, Anthony Iorio and Edward Hutnik constitute all of the Trustees of the Pension Fund duly designated by the Unions in accordance with the Trust Agreement, but denies the other averments in paragraph 7 and specifically avers that said Trustees lack ca-

*Answer of Defendant Kraftco Corporation*

pacity to sue on behalf of all of the Trustees of the Pension Fund, or on behalf of the Pension Fund.

8. Admits that defendants Herbert B. Armel, Emer C. Flounders, Harvey J. Frem, Andrew F. Gruninger, Jr., Austin Puvogel, Louis Schachter and H. Schuyler Todd, constitute all of the Trustees of the Pension Trust Fund who are the Employer Trustees duly designated in accordance with the Trust Agreement but denies the other averments of paragraph 8.

9. Admits and avers defendant Kraftco Corporation is an employer engaged in industry affecting commerce within the meaning of Section 301 of the Labor Management Relations Act, 1947, as amended (29 U.S.C. 185), that it is an employer of employees represented by the Unions, that it is a party to the Trust Agreement, that it and other such employers who are parties to the Trust Agreement are and have been obligated to make contributions to the Pension Fund in accordance with the terms of separate written collective bargaining agreements in effect from time to time between them and the Unions, and that the Trustees of the Pension Fund receive such employer contributions pursuant to the terms of the Trust Agreement, but denies the other averments of paragraph 9.

10. Answering paragraph 10, repeats the admissions and averments of paragraphs 5, 6 and 9 hereof with respect to the Trust Agreement and collective bargaining agreements and refers to the provisions thereof, but except as so admitted denies the averments of paragraph 10.

11. Admits and avers that on and prior to April 18, 1969, the corporate defendant, Kraftco Corporation, was

*Answer of Defendant Kraftco Corporation*

known as National Dairy Products Corporation, that Seal-test Foods Division has been and is a trade division of said defendant and that all references to defendant Kraftco Corporation in the Complaint and in this Answer are understood to include said Division.

12. Admits the averments of paragraph 12.
13. Admits the averments of paragraph 13.
14. Admits the averments of paragraph 14.
15. Admits the averments of paragraph 15.
16. Admits and avers that on April 25, 1968, defendant Kraftco Corporation and the Unions entered into or attempted to enter into an agreement pertaining to the closing of defendant Kraftco Corporation's Breyer Ice Cream plant in Newark, New Jersey ("the Breyer Agreement"), that the Breyer Agreement was collateral to the collective bargaining agreements between defendant Kraftco Corporation and the Unions which were the subject of contemporaneous negotiations, that Exhibits D and E to the Complaint were executed as a result of such negotiations and that Exhibit F to the Complaint was intended to be a memorandum of the Breyer Agreement, but denies the other averments of paragraph 16.
17. Denies the averments of paragraph 17 and refers to Exhibit F to the Complaint for the text and context thereof.
18. Denies the averments of paragraph 18, except admits that on and prior to October 21, 1969 Martin E. Segal

*Answer of Defendant Kraftco Corporation*

Company, consultants to the Pension Fund, purported to determine that the Fund had incurred a deficit of \$978,100.00 as a result of the closing of the Breyer plant, but specifically denies that such purported determination constitutes the actuarial study required by the Breyer Agreement.

19. Admits that on or about December 21, 1969, the attorneys for plaintiffs demanded that defendant Kraftco Corporation pay \$978,100 to the Pension Fund and that defendant Kraftco Corporation has refused to make such payment, but denies the other averments of paragraph 19.

20. Answering paragraph 20, repeats the averments with respect to capacity of paragraph 7 hereof, admits that plaintiff Peter F. Clark sues in a representative capacity on behalf of Local 757 and that plaintiff Lawrence W. McGinley sues in a representative capacity on behalf of Local 680, but denies the other averments of paragraph 20.

21. Denies knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 21.

22. Denies the averments of paragraph 22.

**SECOND DEFENSE**

23. Defendant Kraftco Corporation and the Unions attempted by the Breyer Agreement and Exhibit F to the Complaint to express an intention that a particular actuarial study of the Pension Fund be made.

24. The Breyer Agreement and Exhibit F to the Complaint did not define the facts and assumptions on the

*Answer of Defendant Kraftco Corporation*

basis of which the study would be made with sufficient clarity to enable an actuary to determine what particular actuarial study was intended.

25. The plaintiffs do not have a claim against defendant Kraftco Corporation upon which relief can be granted based on the Breyer Agreement.

WHEREFORE defendant Kraftco Corporation demands judgment dismissing the Complaint, together with costs and disbursements of this action and such other or further relief as to the Court may seem just and equitable.

July 1, 1970

SULLIVAN & CROMWELL

By MICHAEL A. COOPER  
(A Member of the Firm)

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**Deposition of Martin E. Segal Company**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246

◆◆◆  
[SAME TITLE]  
◆◆◆

Deposition of MARTIN E. SEGAL COMPANY by, a witness,  
taken by defendant Kraftco Corporation, pursuant to sub-  
poena dated April 9, 1970, at the offices of Messrs. Sullivan  
& Cromwell, 48 Wall Street, New York, N. Y. 10005, . . .

[2] APPEARANCES:

Messrs. COHEN & WEISS,  
Attorneys for plaintiffs,  
605 Third Avenue,  
New York, N.Y. 10016,

By: SAMUEL J. COHEN, Esq.,  
Of Counsel.

Messrs. SULLIVAN & CROMWELL,  
Attorneys for defendant Kraftco Corporation,  
48 Wall Street,  
New York, N.Y. 10005,

By: JOHN F. CANNON, Esq.,  
Of Counsel.

Messrs. SIMPSON, THACHER & BARTLETT,  
Attorneys for witness,  
One Battery Park Plaza,  
New York, N.Y.,

By: ROY L. REARDON, Esq.,  
Of Counsel.

*Jack M. Elkin—Direct*

ALSO PRESENT:

MICHAEL J. RYAN, JR., ESQ.

GEORGE SCOTT ROMNEY

\* \* \*

JACK M. ELKIN, being first duly sworn by the Notary Public (William Blitz), testified as follows:

*Examination by Mr. Cannon:*

Q. Would you state your name for the record, please?  
A. Jack M. Elkin.

Q. Your address? A. Business? 730 Fifth Avenue, Martin E. Segal Company.

Q. You are an employee of Martin E. Segal Company?  
A. I am an employee.

Q. Are you an officer? A. Officer.

Q. What's your official position? A. Senior Vice-President and Chief Actuary.

[4] Q. What is your educational background? A. I have a bachelor's degree with a major in mathematics from the City College of New York.

I have a master of arts degree in mathematics from Columbia University

\* \* \* \* \*

[7] Q. As senior vice-president and chief actuary of Martin E. Segal Company, would you describe your duties, please? A. My duties are to supervise the actuarial calculations that are necessary to carry out the assignments given to us by our clients.

We perform valuations of pension funds. We do special calculations as required to determine the costs of amend-

*Jack M. Elkin—Direct*

ments to pension plans, changes in methods of funding pension plans, the affect on a pension plan of a new employer coming under its coverage or an employer leaving its coverage and related matters along those lines.

Q. So you supervise actuarial calculations. Do you also determine what actuarial calculations are to be made in pursuance of these assignments? A. Yes, it would fall within my province to decide whether a calculation of a certain type would produce the answer to the particular problem.

I would review with my subordinates the actuarial assumptions made, the general mathematical procedures, whether a certain approximation would be suitable for the result required, whether a certain more refined calculation would be necessary, the timeliness [8] within which the calculation would be performed and so on.

Q. The—A. The timeliness within which a calculation would be performed. These are things which I would discuss with my subordinates until I am satisfied in my mind they are going ahead correctly and adequately for the job at hand.

Q. With respect, Mr. Elkin, to the ice cream industry—drivers and ice cream industry employees union pension fund, what has been your connection with this fund over say the past five years?

For purposes of clarity, when we discuss hereafter the pension fund, we will be referring to this fund. A. This is one of some 400 pension funds for which we perform actuarial valuations from time to time, usually annually.

Q. Is it true that over the period of the last five years you have been the person at Martin E. Segal primarily, ultimately responsible? A. Ultimately, yes. I am the one that signs the actuarial certifications which attest to the actuarial status of the pension fund.

*Jack M. Elkin—Direct*

[9] And I am responsible for the actuarial approach that's taken to the determination of the fund's liabilities and actuarial status and ultimately the certification to the Treasury that the plan continues to qualify and meets its obligations according to a certain schedule.

Q. With respect to this particular pension fund then over the period of the last five years, all of the advice and judgments made by Martin E. Segal—A. Came ultimately from me.

Q. Let me finish the question. The transcript will look better if the question is finished. A. All right.

Q. That all of these judgments and determinations were ultimately made by you in the sense that you were ultimately responsible for them? A. That would be correct.

Q. Is this also true of the study which is the subject matter of the complaint in this case? A. That is true.

\* \* \* \* \*

[10] Q. Did Martin E. Segal make a study in the recent past of the affect upon this pension fund that we are talking about of action taken by the Borden Company?

\* \* \* \* \*

[11] A. There was such a study.

Q. Would you be responsible for that study? A. I was.

Q. In the same way that you were for the Breyer study?

A. Yes.

Q. I show you Exhibit F to the complaint here. It is a two page document at the top of which on the copy I have here appears "Exhibit F, Breyer Plant Contract." Those words are not part of the document.

I would like to ask you a question or two about that.

\* \* \* \* \*

*Jack M. Elkin—Direct*

[12] Q. Have you seen that document before today?  
A. Yes.

Q. When did you first see that document? A. I don't remember the exact date. It was probably a little over two years ago. Probably in '68.

Q. Do you have any documents with you today which would refresh your recollection with respect to the date at or about which you first saw that document? A. Yes. There is a transmittal letter from Mr. Cohen to Irving McDougall, an account executive in the Martin Segal Company dated May 27, 1968, to which that document is attached.

Q. May I see it? A. Yes.

\* \* \* \* \*

[13] Q. You said Mr. McDougall was an account executive at Martin E. Segal. Is he also an officer? A. Yes, he's a senior vice-president.

Q. Is he an actuary? A. No, he's not an actuary.

Q. What was his relationship to the relationship between the fund and Martin E. Segal? A. He is Martin E. Segal's account executive to that fund.

Q. As account executive to the fund, what are his duties? A. He meets with the trustees, helps them originally in the establishment of a plan, discusses their administrative problems, the problems of clearing things with the Treasury Department, setting up a fund record keeping system to receive remittances, records to pay benefits, discusses with the fund trustees from time to time problems arising in the administration and management of the pension fund, discussing with them [14] possible changes in the plan and transmitting to them the actuarial reports that I prepare.

*Jack M. Elkin—Direct*

Q. This letter of May 27th is addressed to Mr. McDougall, Exhibit 2. When did you first see it with reference to May 27th, do you recall? A. I don't recall but in the normal course of events it would be shortly after that.

Q. Did Mr. McDougall show it to you himself? A. I say in the normal course of events he would have shown me the letter, discussed—

Q. Do you have any recollection of it? A. I don't remember the occasion on which he did it. Perhaps it was through a memorandum or perhaps a personal conversation.

\* \* \* \* \*

[21] Q. I would like you at this point, if you could, to list the names of all the people that you can remember having had any discussions with or any kind of communications with between the time you first saw Exhibit 1 and October, 1969, and with whom you discussed in any way either the agreement or the study that you made in connection with the agreement. A. I would have discussed this with Mr. McDougall and with Tom Fitzgerald who took over as account executive on the case some time in '69.

Then I discussed the actuarial procedures that would have to be followed with a member of my staff who actually went through the calculations, presented them to me.

Q. Who is that? A. Miss Dale Grant, Mrs. Dale Grant.

Q. Were there any others with whom you discussed this in any way at any time during that period? A. No, I don't recall any.

\* \* \*

[26] Q. Mr. Elkin, does Exhibit 3 refresh your recollection any as to when you first saw Exhibit 1? A. I would

*Jack M. Elkin—Direct*

gather from this that I saw Exhibit 1 some time between the date of the exhibit and the date of this letter.

Q. Some time between May 27th and May 31st? A. That would be natural, yes.

[27] Q. I take it you are engaging in a little surmising now? You don't really recall; is that right? A. Well, I don't recall when I first received this particular problem. I assume I would have learned about it from this.

Q. From what? A. From the actual—

Mr. Reardon: Defendant's 1 for identification.

The Witness: From the actual document.

This is the kind of letter that would be written to a fund office—

Q. "This" now referring to Exhibit 3? A. Yes. This is the type of letter that would have been written to a fund office after I would have discussed with Mr. McDougall the nature of the problem and the kind of information that has to be requested.

Now, it is possible—I have no recollection—it is possible that Mr. McDougall told me about this as a problem that we would have to deal with before I saw this. I don't recall that.

Q. In other words, Exhibit 3 could have been written by Mr. McDougall prior to your having seen Exhibit 1; is that correct? [28] A. It could have been written by Mr. McDougall after I learned of the nature of the problem and discussed it with him and discussed with him the nature of the data that had to be requested.

Q. Your testimony is— A. I'm saying—

Q. Wait. Let me see if I can put a question to you.

*Jack M. Elkin—Direct*

You are saying on or prior to May 31, 1968, it would be your present recollection that you understood the problem at that time? A. Yes.

Q. But that you might not have seen Exhibit 1 prior to the writing of Exhibit 3? A. That would be possible, yes.

But I would have been familiar with the nature of the problem at the time this was written.

Q. How would you have been familiar with the nature of the problem otherwise than by examining Exhibit 1? A. Mr. McDougall telling me about the substance of it. Mr. McDougall though not an actuary is quite familiar with the actuarial principles and practices and has done a good deal of reading on it [29] himself and is quite capable of transmitting to me the nature of an actuarial problem that we have to work on.

Q. So that the problem as it was conceived by you on May 31st might have been as a result of Mr. McDougall's telling you what the problem was? A. That could have been, yes, the case.

Q. What conversation did you have with Mr. McDougall prior to the writing of Exhibit 3 dated May 31st? A. Well, I can't recall the conversation. I could only indicate to you the nature in which this matter would have been handled.

\* \* \*

[30] Q. Would it be your testimony, Mr. Elkin, that it was in this period of time, May 27th to May 31st, that you decided what kind of study you would make pursuant to Exhibit 1? A. No.

All I could say is that it was before May 31st that I decided that.

*Jack M. Elkin—Direct*

Q. Before May 31st you decided what kind of study to be made? A. Yes.

Q. May 31, 1968? A. Right.

\* \* \* \* \*

[47] Q. How soon after it was prepared did you see this document, Exhibit 15? Or did you ever see it, first of all, prior to this lawsuit? A. I can't recall the—when I saw it if ever I saw it. I can only tell you that normally memoranda [48] like this from one of my assistants to an account executive would go through me.

Q. Through you or— A. No, I would be shown the memorandum in draft. I would have approved of the results before it was typed up and given to the—

Q. But you have no particular recollection of having approved this one? A. I can't say that, no. I could only tell you that all calculations of this kind for which I took on responsibility I would have approved before it was transmitted.

Q. Do you recall approving that before transmission to Mr. Fitzgerald? A. I can't tell you that I recall it, no.

Mr. Reardon: By "that," you mean that document?

Mr. Cannon: Yes, Exhibit 15.

The Witness: If you ask me whether I recall approving the results that are contained in these work sheets, then I do. And the results are the same as incorporated in that document.

\* \* \* \* \*

*Jack M. Elkin—Direct*

[126] Q. So that as of April 4, 1969, you had already calculated this \$1 million approximately that was allegedly necessary to restore the pension fund? A. Yes.

\* \* \* \* \*

[133] Q. Let me direct your attention, Mr. Elkin, to Exhibit 17 and to Article 1, Section 1 and more specifically to the following sentence which appears in the middle of that paragraph:

"In the case of an employer in an industry other than the ice cream industry employer shall mean one who has executed a collective bargaining agreement and who has agreed to be bound by and has executed a copy of this agreement and declaration of trust, provided that the extension of coverage to the employees of such employer will not adversely affect the soundness of the fund as determined by the fund's actuaries."

Could you tell me what kind of an actuarial calculation would be made in response to that provision if an employer sought entry into the fund? This fund. A. We would probably make two kinds of determinations.

We would look at the characteristics of the [134] employees of the employers seeking admission and determine whether the characteristics are such as to increase the burden on the already covered employees.

Q. Could you elaborate on what you mean by increase the burden? A. Well, the existing employers are making a certain contribution. They have been making that contribution over a number of years. Assets have accumulated.

A new employer now comes into the fund or seeks admission and will presumably be paying the same contribution that other employers have been paying for some time.

*Jack M. Elkin—Direct*

The question is will the average cost for the fund as a whole go up or will it actually be decreased if this new employer comes in with its employees and without a fund corresponding to the fund that has accumulated so far.

We would also make another type of determination, if the trustees were interested in it. I'm not sure in this case whether they would be, but we do it often in similar funds.

We would determine whether if the employer were to come in for one collective bargaining agreement, [135] make contributions for that period, retire a number of people during that period, and then decide to terminate its coverage, whether the contributions that employer had made will be sufficient to pay the lifetime benefits for those who retired during that period.

Now, sometimes trustees are interested in a determination like that and sometimes they aren't.

Q. Let us go back to the first type of calculation you described.

Could you be a little bit more specific as to what would be involved in if you would, tie it as best you can to this fund by use of whatever descriptions there are in these exhibits, 18 through 20, the nature of the fund?

You say you would look at employee characteristics. What would you do specifically?

\* \* \* \* \*

[138] Mr. Cannon: Now if we can return to the question I would like to find out what kind of study would be made upon the entry of an employer as contemplated by the quoted language in Exhibit 17.

[139] The Witness: I think I indicated it.

*Jack M. Elkin—Direct*

We would examine the age and service characteristic of the group to see whether on a per capita basis it represented a more or less costly group than the group already in existence with due account taken of the funds that had already been accumulated for the pre-existing employers.

\* \* \* \* \*

[141] Q. As these terms are used in Exhibit 19, for purposes of the entry of a new employer you would take the cost per active employee before the entry of the new employer, calculate a cost per active employee assuming that the employees of the new employer were in the group, and if there were a difference on the upside, that is to say the costs per active employee were increased, you would multiply that figure by the total number of employees including the new employees to come up with a dollar figure? A. That's one of the things we might do for the employers, yes, for the fund.

\* \* \* \* \*

[151] Q. You calculated a sum to fully fund past service liability in respect of Breyer employees and then made it generally available to the rest of the fund? A. I didn't make it generally available—

Q. I am talking theoretically. In other words, if paid in it would be made available to the rest of the fund? A. Theoretically it would be part of the fund, yes.

It would be fully consistent with an actuary's approach to this if the million dollars were paid in in installments.

The actuary is only concerned with the present value of the deficit in the fund resulting from an employer's termination. The actuary then comes up with a lump sum

*Jack M. Elkin—Direct*

payment. If the parties want to have some other arrangement about meeting that obligation, that's not the actuary's concern.

\* \* \* \* \*

[157] Q. Let me ask you to identify this document, Mr. Elkin, please. A. It is a memorandum from Mr. Fitzgerald to the board of trustees of the ice cream fund showing the results—

[158] Mr. Reardon: Period. That is fine. Just give the date.

The Witness: It is dated October 10, 1969.

Q. I believe you have already testified that you were responsible for the actuarial aspects of the study reflected in that exhibit which I would like to mark as No. 21. A. I think at this time Mike Kaplan was more closely identified with it than I. As chief actuary I am generally responsible.

Q. Were you ultimately responsible? A. I was not actually involved in this calculation. I take responsibility for it. I know it was done.

Q. Were you aware of it when it was in progress? A. Yes.

\* \* \* \* \*

[159] Mr. Cohen: Off the record.

(Discussion off the record.)

Mr. Cannon: Mr. Cohen cannot recall the date.

Mr. Cohen: But will be glad to get it for Mr. Cannon.

Mr. Cannon: Thank you. I appreciate it.

*Irving McDougall—Direct*

*By Mr. Cannon:*

Q. I believe, Mr. Elkin, you said that Mr. Kaplan did that calculation? A. I think he was responsible for it at that time, yes.

Q. Were you familiar with the basis upon which the calculation was being made while it was being made or did your first knowledge of it come upon seeing this memorandum, Exhibit 21? A. I think the latter.

But it is the kind of calculation with which I am thoroughly familiar. Things like this had been done before.

\* \* \* \* \*

[25] A F T E R N O O N   S E S S I O N

1:40 P.M.

IRVING A. McDougall, being first duly sworn by the Notary Public (William Blitz), testified as follows:

*Examination By Mr. Cannon:*

Q. Would you give the reporter your name and address, please? A. Irving A. McDougall, M-c-D-o-u-g-a-l-l.

I reside at 7 Old Albany Post Road, Croton-on-the-Hudson, New York.

Q. Where are you presently employed, Mr. McDougall? A. I am retired from Martin E. Segal Company as of October 1st.

\* \* \* \* \*

[38] Q. I believe you testified that with reference to Exhibit 2 that the first time you saw Exhibit 1, the so-called Breyer agreement, was when you received that letter dated May 27, 1968? A. Yes, sir.

*Irving McDougall—Direct*

Q. May 27, 1968, was a Monday.

Do you have any recollection whether you received that on that date or the day after? A. No. I can't understand why we don't have our received stamp, because it's routine with incoming mail to stamp, you know. But somehow this didn't happen. And so I don't know what day I received it. Presumably the 28th.

Q. Could you tell me—let me put another document before you which is Exhibit 3—and with those two documents before you could you tell me everything that you [39] did with reference to Exhibit 2 and the attachment between the two dates on those two documents, May 27 and May 31, 1968? A. Yes.

I remember that I took a yellow pad out and started to set down all of the things I could think of in the way of information that we would need to make such a determination.

And I discussed that with somebody in the actuarial department. It could have been Jack Elkin or it could be Bob Krinsky, to get his approval that I had asked for information and following that I dictated the letter shown as Exhibit 3.

Q. Do you have those yellow pad notes that you made? A. No.

Q. These yellow pad notes— A. If it will help, I will say that everything that is shown in this letter is what was on that pad.

Q. That was to be my question. Would it be your best recollection that that yellow pad set of notes was a draft that ultimately produced the letter which is Exhibit 3? A. It was my feeling—it was my belief that this was the information needed, and I checked with somebody [40] in

*Irving McDougall—Direct*

the actuarial department and they simply okayed it. And I'm certain at that time there were no changes.

Q. Could you give me your best recollection in exact detail as to the sequence of these things? What exactly did you say to the man in the actuarial department? Did you talk to him on the phone? A. No, I walked down to his office and showed him the agreement first, so he would know what it was all about, and then said this is the data and I think we ought to have, do you want to add anything to it. And he looked it over rather briefly and said no, that's okay.

Q. How long do you think this conversation took? A. The conversation didn't take very long. The reading of the document might have taken a bit longer.

Q. Put a period of time on it. A. Put it all together, 15 minutes outside.

Q. I would like once again to make sure that I have gotten as much of your recollection as you can give me on the conversation that you had with this party in the actuarial department.

Mr. Reardon: If you can recall. Do not make it up.

Mr. Cannon: Yes, I do not want speculation, [41] obviously.

A. I know generally I took the agreement with me as well as the yellow pad, and explained the situation to him and asked him—

Q. What did you say? A. I said that here's a letter I got from Sam Cohen and it refers to the closing of a Breyers plant in Newark, I guess it was, and pointed to the section that asked me—directed us to make an actuarial calculation regarding whether their leaving would result in a deficit.

*Irving McDougall—Direct*

I can't recall the exact words, of course, but I explained the situation very briefly. He read the agreement. I think he probably only read that section that concerned us. And then he looked at the yellow pad at the items that I had put down which are to the best of my recollection—I will go better than that—which I know are the same that I had on the pad.

Q. So that in terms of what was necessary to make the calculation and the nature of the calculation itself, you made that determination initially based upon your own reading of the document? A. I made the determination only as to the data to be secured. I made no determination whatsoever about what would be done with the data once it was secured.

[42] In other words, you asked me a double-barreled question and the answer is yes to the first part and no to the second. I did not make any determination as to what would be done with the data when it was received.

Q. When did Martin E. Segal make the determination of the type of study that would be involved here? A. I can't say. Was that question asked of Elkin? He might recall.

Q. Have you read the deposition transcript? A. No.

Q. Can you explain to me on what basis you, yourself, decided that this information was called for by the agreement and would be required?

Can you explain for me briefly how you reached that conclusion? A. In general, the problem was a matter of determining whether the amounts received in contributions over the years from Breyers plant was sufficient to finance the benefits hitherto paid and thereafter to be expected to be paid.

In order to—

*Irving McDougall—Direct*

Q. Can I— A. I might as well finish this.

Q. All right. [43] A. In order to do that you have to know something about what has been put into the fund and what liabilities exist.

Now, if you look at all of these categories you will see, number 1 has to do with active employees and quite obviously the liability for them will depend on their age, sex and length of service.

Number 2 has to do with surviving pensioners, and obviously how old they are, their sex and how much they are getting as a liability.

Item 3, we asked for the aggregate contributions made from inception by Breyer, Newark.

And 4, we will need to know the aggregate amount of pension payments previously made to all pensioners whose last employer was Breyer, Newark.

Now, it seems to me quite obvious that in a problem of this kind, these are the minimum requirements.

\* \* \*

**Exhibit 21 to Deposition of  
Martin E. Segal Company**

**MEMORANDUM**

**MARTIN E. SEGAL COMPANY**

**October 10, 1969**

**FROM** Thomas W. Fitzgerald  
**To** Board of Trustees—  
 Ice Cream Industry Drivers  
 and Ice Cream Employees  
 Unions Pension Fund

*re* CLOSING OF BORDEN PLANT

We have calculated costs to determine the effect of the closing of the Borden Plant on the Fund. The following table compares the cost of the plan including the Borden people as active employees with the cost of the plan excluding Borden but including a liability for all Borden employees eligible to retire immediately.

	<b>Number of Employees</b>	<b>Total cost of Plan</b>	<b>Expected Contributions</b>	<b>Deficit</b>	<b>Cost per active Employee</b>
Including Bordens	1973	\$1,528,500	\$1,469,200	4%	\$774.71
Excluding Bordens	1601	1,339,100	1,192,300	12%	836.41

\* Based on 261.3 days worked during 1968-69.

We do not include costs or contributions for termination benefits since there is a separate termination account. Our calculations indicate that \$589,400 in termination benefits

*Exhibit 21 to Deposition of Martin E. Segal Company*

will be paid if all eligible from Bordens apply for them. As of April 30, 1969, the termination benefit account amounted to \$187,300.

We have also calculated that the liability as a result of the closing, which must be absorbed in the costs for the remaining employees has a present value of \$3,338,400. If this was to be amortized over a 20 year period it would cost \$221,400 annually. If this was to be amortized over a 10 year period it would cost \$386,100 annually.

All of the aforementioned costs are based on the assumption that none of the employees involved will remain in the fund. If any part of the 372 employees should continue in Covered Employment in the Fund, the dollar values would decrease accordingly.

The Trustees have received a prior memo on the Breyer Closing. The computation in the Breyer situation was made differently since there was a ten month period to make exact computations. To provide the same type of calculations in this case would require several months to compile the date and translate such data into exact dollars. It would require the cooperation of the Borden Company, detailed result of records in the fund office and exact statistical data from both being forwarded to this office.

**Plaintiffs' Notice of Motion for Summary Judgment**  
**Dated October 23, 1970**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246 H.R.T.

◆  
[SAME TITLE]  
◆

PLEASE TAKE NOTICE, that the undersigned will move this Court at Room 2704, United States District Court House in Foley Square, Borough of Manhattan, City of New York, on the 6th day of November, 1970 at 2:15 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(g) of the General Rules of this Court, for the entry of summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon:

- (a) The pleadings and the exhibits annexed thereto.
- (b) The annexed Statement of Material Facts pursuant to Rule 9(g) of this Court.
- (c) The annexed affidavit of Samuel J. Cohen.
- (d) Plaintiffs' Memorandum of Law in Support of the Motion for Summary Judgment.

Dated: New York, N. Y.  
October 23, 1970.

*Plaintiff's Notice of Motion for Summary Judgment*  
*Dated October 23, 1970*

COHEN AND WEISS

By: /s/ STANLEY M. BERMAN  
(A Member of the Firm)

Attorneys for Plaintiffs  
605 Third Avenue  
New York, New York 10016  
Tel: MU 2-6077

To:

SULLIVAN & CROMWELL, ESQS.

Attorneys for Defendant Kraftco Corporation  
48 Wall Street  
New York, N. Y. 10005

and

SCHACTER & WISEMAN, ESQS.

Attorneys for Defendants, Herbert B. Armel  
and Louis Schacter  
331 Madison Avenue  
New York, N. Y. 10017

and

SOLOMON & ROSENBAUM, ESQS.

Attorneys for Defendants, Flounders, Frem,  
Gruninger, Puvogel and Todd  
1450 Broadway  
New York, N. Y. 10018

**Plaintiffs' Statement Under General Rule 9(g)**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246 H.R.T.

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[SAME TITLE]

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**PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO WHICH  
THERE IS NO GENUINE ISSUE (FILED PURSUANT TO  
RULE 9(g) OF THIS COURT)**

Plaintiffs contend that there is no dispute as to the following material facts:

1. Plaintiff Peter F. Clark is President of Ice Cream Drivers and Employees Union Local 757. The regular office and place of business of Plaintiff Ice Cream Drivers and Employees Union Local 757 is at 265 West 14 Street, in the City, County and State of New York.
2. Plaintiff Lawrence W. McGinley is President of Milk Drivers and Dairy Employees Union Local 680. The regular office and principal place of business of Plaintiff Milk Drivers and Dairy Employees Union Local 680 is at 553 High Street, in the City of Newark, County of Essex, and State of New Jersey.
3. Ice Cream Drivers and Employees Union Local 757 and the Milk Drivers and Dairy Employees Union Local 680 (hereinafter referred to as the "Unions") are labor organizations within the meaning of Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. 185.

*Plaintiffs' Statement Under General Rule 9(g)*

4. Defendant Kraftco Corporation (hereinafter referred to as "Kraftco") is an employer engaged in an industry affecting commerce, and is an employer of employees represented by the Unions, and is a party to the Trust Agreement (Complaint, Exhibit "A") and is obligated to make contributions to the Pension Fund in accordance with the requirements of the Trust Agreement and the collective bargaining agreements (Complaint, Exhibits B, C, D and E) duly entered into between Kraftco and the Unions. Defendant Kraftco has an office and regular place of business at 260 Madison Avenue, in the City, County and State of New York.

5. The Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Fund is a pension trust fund established pursuant to Section 302 of the Labor Management Relations Act of 1947 between Unions and Kraftco and other employers of members of the Unions. The regular office and place of business of the Pension Fund is at 250 West 57 Street, in the City, County and State of New York.

6. Plaintiffs Peter F. Clark, Emanuel Parish, Anthony Carlino, Lawrence W. McGinley, Anthony Iorio and Edward Hutnik are the employee representatives designated as Trustees of the Pension Fund.

7. Defendants Herbert B. Armel, Emer C. Flounders, Harvey J. Frem, Andrew F. Gruninger, Jr., Austin Puvo-gel, Louis Schacter and H. Schuyler Todd are the employer representatives duly designated as Trustees of the Pension Fund.

8. On or about April 25, 1968, a separate and distinct contract was entered into between the Unions and Kraftco pertaining to the closing of the ice cream factory operated

*Plaintiffs' Statement Under General Rule 9(g)*

by Kraftco at Newark, New Jersey, known as the Breyer plant (Complaint, Exhibit "F").

9. Martin E. Segal and Company, Inc. are and at all relevant times have been the actuarial consultants to the Pension Fund.

10. In accordance with the terms and conditions of the aforesaid contract, Martin E. Segal & Co. Inc., the actuarial consultants of the Pension Fund, made a determination, on or about October 21, 1969, that the Pension Fund had been adversely affected as the result of the discontinuance of operations by Kraftco at the Breyer plant and that a deficit of \$987,100 had been incurred by the Pension Fund as a result of the closing of the Breyer plant (Cohen affidavit, Exhibit "B").

11. Upon the making of the aforesaid determination by the consultants to the Pension Fund, the plaintiffs duly demanded of the defendant, Kraftco, that the said sum of \$978,100 be paid by Kraftco to the Pension Fund, but Kraftco has failed and refused to make such payment.

Dated: New York, N.Y.  
October 23, 1970

Respectfully submitted,

COHEN AND WEISS

By: .....

(A Member of the Firm)

Attorneys for Plaintiffs  
605 Third Avenue  
New York, N.Y. 10016  
MU 2-6077

**Affidavit of Samuel J. Cohen in Support of Motion**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

File No. 70 Civ. 1246 H.R.T.

◆—————  
[SAME TITLE]  
—————◆

STATE OF NEW YORK      }  
COUNTY OF NEW YORK    }ss.:

SAMUEL J. COHEN being duly sworn deposes and says:

1. This affidavit is submitted in support of the plaintiffs' motion for summary judgment.
2. I am a member of Cohen and Weiss, the attorneys for the plaintiffs herein. As counsel for the plaintiffs I participated in all of the discussions and contract negotiations between the parties which relate to this action. I am thoroughly familiar with the matters at issue.
3. For over 15 years I have been counsel for the plaintiff Unions who represent, among others, ice cream manufacturing and ice cream distributing employees working in the New York-New Jersey Metropolitan Area.
4. As counsel for the Unions I have represented them in their collective bargaining negotiations with employers engaged in the ice cream industry in the above area.
5. The aforesaid negotiations are customarily conducted on an industry-wide basis at three-year intervals. The contract so negotiated is known as the Ice Cream Industry Area-Wide Agreement.

*Affidavit of Samuel J. Cohen in Support of Motion*

6. Among other terms and conditions the said agreement provides for the maintenance of the Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Fund herein referred to as the Pension Fund, and for the payment of specified contributions to the said Pension Fund by the employers covered by the agreement.

7. The Ice Cream Industry Area-Wide Agreement which became effective on May 1, 1965, expired by its terms on April 30, 1968.

8. Negotiations for the renewal of the Ice Cream Industry Area-Wide Agreement took place at the Sheraton Motor Inn, 12th Avenue and 42nd Street, in the Borough of Manhattan, in the month of April, 1968.

9. It became known to the Unions that the defendant, Kraftco Corporation, then known as National Dairy Corporation, intended shortly to close down its Sealtest Division ice cream manufacturing plant located at Newark, New Jersey, known as the Breyer Plant.

10. The closing of a plant covered by the collective bargaining agreement would necessarily result in diminished employment and therefore diminished employer contributions to the Pension Fund, since contributions are based on hours worked. The diminution in jobs would result in earlier retirement for many employees. Thus the Pension Fund would be doubly hurt. It would suffer from a reduction of its income and an increase of its expense.

11. Because it was claimed by the Unions that the closing down of the Breyer Plant and the consequent layoff or dismissal of employees covered by the Ice Cream Industry

*Affidavit of Samuel J. Cohen in Support of Motion*

Area-Wide Agreement would violate the Agreement, and the new agreement then being negotiated, and would adversely affect the Pension Fund to a substantial degree, and because there was a difference of opinion between the Unions and Kraftco concerning the extent of such adverse impact, the Unions requested and Kraftco agreed to negotiate a separate agreement to settle their claims and differences with respect to this matter before proceeding further with the negotiation of the terms and conditions of the renewal of the Ice Cream Industry Area-Wide Agreement.

12. Such separate agreement, referred to as the Breyer Plant Agreement, a copy of which is attached to the complaint marked Exhibit F, was then negotiated and executed by the parties. The signing of the Breyer Plant Agreement took place on or about April 25, 1968. For convenience, a copy of said Agreement is annexed hereto as Exhibit A.

13. Kraftco was represented throughout the said negotiations and in the preparation and execution of the Breyer Plant Agreement by Attorney James J. Leyden of the Philadelphia law firm of Schneider, Harrison, Segal & Lewis. The Union parties to the Breyer Plant Agreement were represented by me throughout the negotiations and in the preparation and execution of the Breyer Plant Agreement.

14. As the Breyer Plant Agreement shows by its plain language, the parties agreed that the extent of the adverse impact on the Pension Fund caused by the closing of the Breyer Plant would be determined by the consultants to the Pension Fund who then were and still are Martin E. Segal & Company, Inc. of 730 Fifth Avenue, New York, New York. The firm of Martin E. Segal & Company, Inc. is one of the principal actuarial consulting firms for pension funds in the United States.

*Affidavit of Samuel J. Cohen in Support of Motion*

15. On or about October 21, 1969, Martin E. Segal & Company, Inc., as the actuarial consultants to the Pension Fund, made and issued their written determination that the Fund had been adversely affected as a result of the discontinuance of operations by Kraftco Corporation at the Breyer Plant and that a deficit of \$978,100.00 had been incurred by the Pension Fund as a result of the closing of the Breyer Plant. A copy of said determination is annexed hereto marked Exhibit B.

16. Kraftco Corporation has on various occasions since the making of the aforesaid determination by the consultants to the Pension Fund, requested additional information from them concerning the manner in which they arrived at their determination, but has failed and refused to pay to the Pension Fund the said sum of \$978,100.00 which remains due and owing.

17. It is not clear from Kraftco's answer herein precisely what position the defendant, Kraftco Corporation, is prepared to take in seeking to avoid liability for the aforesaid amount, but it is clear that no valid defense exists.

18. As shown by the memorandum of law submitted on behalf of the plaintiffs, there can be no doubt that the Breyer Plant Agreement is on its face a clear and specific undertaking mutually agreed to by the parties to settle a dispute as to the amount of Kraftco's liability by referring the determination of the amount in question to an appraiser mutually selected.

*Affidavit of Samuel J. Cohen in Support of Motion*

19. The appraiser, Martin E. Segal & Company, Inc., has acted in pursuance of the agreement, and has made a specific determination which, as a matter of law, cannot be questioned except on grounds of fraud or bad faith. No such claims have been asserted by Kraftco's answer and Kraftco's liability for payment of the amount in question can therefore not be validly disputed.

20. Kraftco suggests in its answer that the Breyer Plant Agreement was incomplete or preliminary. This is not so. The Agreement calls for a "final and binding" determination to be made by the "consultants to the pension fund" and contains an unequivocal promise by which "the company agrees to pay to the fund the sums determined by the consultants." It is on its face a clear and complete agreement which, as a matter of law, cannot be varied or contradicted by outside evidence.

21. It is evident that the defense sought to be presented by Kraftco's answer is sham and that summary judgment should be granted in favor of the plaintiffs.

22. The defendants other than Kraftco are nominal defendants against whom no affirmative relief is sought. They consist of Trustees of the Pension Fund who did not ask to become parties plaintiff herein and were therefore joined as parties defendant. Their answers raise no material issues of fact or of law.

WHEREFORE, I respectfully request that plaintiffs' motion be granted and that summary judgment be entered in favor of the plaintiffs against the defendant Kraftco for the relief demanded in the complaint.

/s/ SAMUEL J. COHEN  
Samuel J. Cohen

(Sworn to by Samuel J. Cohen on October 21, 1970.)

**Affidavit of Lawrence W. McGinley in  
Support of Motion**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

File No. 70 Civ. 1246 H.R.T.

◆◆◆  
[SAME TITLE]  
◆◆◆

STATE OF NEW JERSEY }  
COUNTY OF ESSEX } SS.:

LAWRENCE W. McGINLEY, being duly sworn, deposes and says:

1. I am the President of plaintiff Union Local 680. This affidavit is submitted in support of plaintiffs' motion for summary judgment. I participated directly in negotiation of the Breyer Plant Agreement and signed that Agreement on behalf of Local 680. I have personal knowledge of the facts stated herein.
2. I wish to state categorically that no limitations of any kind with respect to the authority given to the Pension Fund's consultants to make a final and binding determination as to the amount to be paid were ever discussed during negotiation of the Breyer Plant Agreement. In any event, I am advised by counsel that parol evidence to vary the plain terms of a written agreement is not admissible upon a trial or a motion for summary judgment. It is not my purpose in making this affidavit to hide behind such a technical rule, although I do not intend to waive it, because

*Affidavit of Lawrence W. McGinley in Support of Motion*

there is nothing to hide. The facts are as I have stated, and the affidavits submitted by Kraftco do not contradict those facts.

3. As is shown by their affidavits, Messrs. Campbell and Bassett did not participate in the Breyer Plant Agreement negotiations. Their interpretations of those negotiations and the intent of the parties are not made on personal knowledge and are wholly conjectural. The only affidavit submitted by Kraftco of anyone who has personal knowledge of the facts is Mr. Leyden's affidavit.

4. Mr. Leyden states in paragraph 4 of his affidavit that,

"Whether or not the Breyer Newark plant closing would affect the Pension Fund adversely was considered an open question at the April 25, 1968 negotiations."

This is correct. It was precisely because there was an "open question" that Kraftco and the Unions selected Martin E. Segal & Company, Inc., the Pension Fund's consultants, as the third party to resolve the dispute and agreed to be bound by its determination. This is what the parties agreed to, and this is what the Breyer Plant Agreement says.

5. Mr. Campbell refers in his affidavit to events which preceded negotiation of the Breyer Plant Agreement including Kraftco's filing of an unfair labor practice charge with the National Labor Relations Board. An unfair labor practice charge is not, of course, self-proving, and the fact is that the Labor Board did not issue a complaint against Local 680. In any event, Mr. Campbell's allegations are not relevant to this action and only serve unnecessarily to con-

*Affidavit of Lawrence W. McGinley in Support of Motion*

fuse the issues. The Breyer Plant Agreement was never the subject of an unfair labor practice charge, and no one to my knowledge has ever suggested that it could be subject to a National Labor Relations Board proceeding.

6. The crucial fact, as substantiated by Mr. Leyden, is that the Unions and Kraftco were in disagreement on April 25, 1968. The Pension Fund's consultants were selected by mutual agreement to resolve this dispute in accordance with the terms of the Breyer Plant Agreement, and this was the only agreement made upon the subject. Kraftco's papers do not show any facts to the contrary.

/s/ LAWRENCE W. McGINLEY  
Lawrence W. McGinley

(Sworn to by Lawrence W. McGinley on December 28,  
1970.)

**Affidavit of Peter F. Clark in Support of Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

File No. 70 Civ. 1246 H.R.T.

—————♦—————  
[SAME TITLE]  
—————♦—————

STATE OF NEW YORK      }  
COUNTY OF NEW YORK      }ss.:

PETER F. CLARK, being duly sworn, deposes and says:

1. I am the President of plaintiff Union Local 757. This affidavit is submitted in support of plaintiffs' motion for summary judgment. I participated directly in negotiation of the Breyer Plant Agreement and signed that Agreement on behalf of Local 757.
2. I have read the affidavit of Lawrence W. McGinley, sworn to on December 28, 1970, Mr. McGinley's statements regarding negotiations of the Breyer Plant Agreement are true to my own knowledge and I concur in those statements.

/s/ PETER F. CLARK  
Peter F. Clark

(Sworn to by Peter F. Clark on December 29, 1970.)

**Defendant Kraftco Corporation's Statement  
Under General Rule 9(g)**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

70 Civ.—1246 H.R.T.

—————♦—————  
[SAME TITLE]  
—————♦—————

**STATEMENT UNDER GENERAL RULE 9(g)  
OF DEFENDANT KRAFTCO CORPORATION**

Defendant Kraftco for its Response to plaintiffs' Statement Under General Rule 9(g) and for its own Statement Under said Rule, states:

**KRAFTCO'S RESPONSE**

1. Kraftco admits the substance of the averments set forth in paragraphs 1 through 7 and paragraph 9 of plaintiffs' Statement and refers to its Answer to the Complaint.
2. Answering paragraph 8 of plaintiffs' Statement, admits that Kraftco and the plaintiff Unions executed the "Memorandum of Agreement entered into the 25th day of April, 1968" annexed to the Complaint as Exhibit F (the "Breyer Agreement"), but denies that the Breyer Agreement is or was intended to be in all respects a "separate and distinct contract," since the matters to which the Breyer Agreement related are regulated by other contractual relationships existing between the parties, including the Agreement and Declaration of Trust annexed to

*Defendant Kraftco Corporation's Statement  
Under General Rule 9(g)*

the Complaint as Exhibit A and the collective bargaining agreements annexed to the Complaint as Exhibits B, C, D and E.

3. Answering paragraph 10 of plaintiffs' Statement, denies that Martin E. Segal Company has made any determination "in accordance with the terms and conditions" of the Breyer Agreement, denies that the purported calculation upon which plaintiffs' rely constitutes the actuarial study intended by the Breyer Agreement, denies that it has been determined that the Pension Fund was adversely affected as a result of the discontinuance of production at the Breyer Newark plant, denies that the purported deficit of \$978,100 calculated by Martin E. Segal resulted from the closing of the Breyer Newark plant, and avers that such alleged deficit existed prior to the closing and was fully covered by the existing assets of the Pension Fund.

4. Answering paragraph 11 of plaintiffs' Statement, admits that the plaintiffs have demanded \$978,100 from Kraftco and that Kraftco has refused to pay, but otherwise denies said paragraph.

**KRAFTCO'S STATEMENT**

Kraftco avers that there exist the following genuine issues with respect to material facts:

1. As a matter of the proper interpretation of the intent of the parties to the Breyer Agreement, can it be found, as contended by plaintiffs, that the parties gave Martin E. Segal Company unlimited authority to adopt whatever procedures and assumptions it wished without regard to

*Defendant Kraftco Corporation's Statement  
Under General Rule 9(g)*

whether or not such procedures and assumptions were consistent with the agreed procedures and assumptions that formed the basis of the Pension Fund, and to make whatever study it wished to make?

Kraftco contends that the Breyer Agreement, other pertinent documents and parol evidence prove that this was not the intent of the parties.

2. As a matter of the proper interpretation of the intent of the parties to the Breyer Agreement, can it be found, as contended by Kraftco, that the parties intended that Martin E. Segal Company make a study (i) only with respect to the specific changes in the future income and obligations of the Pension Fund caused by the Newark plant closing, and (ii) only on the basis of the agreed procedures and assumptions that had been consistently used throughout the 16-year history of the Pension Fund?

Kraftco contends that the Breyer Agreement, other pertinent documents and parol evidence prove that this was the intent of the parties, and that the purported Segal study does not comply with that intent.

3. If it is found that the manifestations of the parties intent in the Breyer Agreement were uncertain and ambiguous so as not to permit proper interpretation of the parties intent;

(a) were both parties equally chargeable with knowledge (or lack of knowledge) of the uncertainty and ambiguity, and,

(b) what did each party separately intend to be the meaning of the words used?

*Defendant Kraftco Corporation's Statement  
Under General Rule 9(g)*

If (a) is answered in the affirmative, an enforceable contract exists only if both parties intended the words to mean the same thing. If (a) is answered in the negative, there is an enforceable contract based upon the meaning attached by the party not chargeable with such knowledge.

4. Assuming that the purported study made by Martin E. Segal Company was intended or permitted under the terms of the Breyer Agreement, was the study so grossly mistaken as to invalidate its results?

Kraftco contends that the study is grossly mistaken and that its results are invalid.

Dated: New York, New York  
December 11, 1970

SULLIVAN & CROMWELL  
Attorneys for Defendant  
Kraftco Corporation  
48 Wall Street  
New York, N. Y. 10005

**Affidavit of David Campbell in Opposition to Motion**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

File No.

70 Civ. 1246 H.R.T.

◆◆◆  
[SAME TITLE]  
◆◆◆

STATE OF NEW YORK      }  
COUNTY OF NEW YORK    }  
                                  {ss.:

DAVID CAMPBELL, being duly sworn, deposes and says:

1. I am the Personnel Director of the Sealtest Foods Division ("Sealtest") of defendant Kraftco Corporation ("Kraftco") which before April 18, 1969 was known as National Dairy Products Corporation. Since prior to April 1, 1952 and continuously to the present the Breyer Ice Cream Company ("Breyer") has been an operating unit of Kraftco engaged in the production and sale of ice cream throughout the New York Metropolitan area. Since January 1, 1957, and continuously to the present Breyer has been an operating division of Sealtest.

2. In my present position, which I have held since September 1, 1965, I am the Sealtest executive primarily responsible for its labor relations, including the labor relations of Breyer. By virtue of the responsibilities of my present position and other positions which I have held with Sealtest since February 1959, through various discussions with informed Kraftco personnel and review of materials

*Affidavit of David Campbell in Opposition to Motion*

in the possession of Kraftco, I have become personally familiar with the matters hereinafter discussed. Many of the facts hereinafter stated can be further substantiated by materials believed to exist, but not presently in the possession of Kraftco. On personal knowledge, information and belief gained from the above, I make this affidavit in opposition to plaintiffs' motion for summary judgment.

3. In an agreement dated as of April 25, 1968, respecting the closing of Breyer's Newark plant, Kraftco agreed, among other things, to pay the amount of the "impact, if any," of the closing upon the Ice Cream Industry Pension Fund, the amount of such effect to be determined by the Fund's actuarial consultants, the Martin E. Segal Company.

4. The purported actuarial determination by the Segal Company of a \$978,100 "deficit" in the Fund is not a study of the effect of the plant closing at all. It is an allocation to Breyer of a portion of a theoretical actuarial liability which existed before the closing and was actually *reduced* by the closing, and which by the explicit understanding between Kraftco and the plaintiff Unions was not to be paid. This action, and this motion, constitute an unconscionable effort by the plaintiff Unions to capitalize on what is at best a colossal blunder by the Segal Company born of a cavalier indifference to the responsibilities and limitations imposed upon them by the text and context of the agreement between the parties.

*Background to the Controversy*

5. In the early part of 1968 Breyer was contemplating the closing of the Newark ice cream plant from which it had been serving markets in northern New Jersey. The Newark plant was inefficient and its operations had become

*Affidavit of David Campbell in Opposition to Motion*

unprofitable. The business realities suggested that the Newark plant be closed and that Breyer's New Jersey markets be served through a distribution facility elsewhere in New Jersey using ice cream products made at its Long Island City plant.

6. Employment relations between Breyer and the production and distribution employees at the Newark plant were governed by a collective bargaining agreement (Complaint, Exhibit C) between Breyer and the employees' exclusive bargaining representative, Local 680 of the Milk Drivers and Dairy Employees Union, a Teamsters' affiliate. Plaintiff Lawrence W. McGinley is the President of Local 680. Relations with Breyer's Long Island City employees were governed by an agreement (Complaint, Exhibit B) with Local 757 of the Ice Cream Drivers and Employees Union, also a Teamsters' affiliate, of which plaintiff Peter F. Clark is the President.

7. The two collective bargaining agreements which were about to expire on April 30, 1968, were substantially identical to each other. These agreements were part of a matrix of substantially identical collective bargaining agreements between Locals 680 and 757 and the other ice cream companies in the Metropolitan area whose employees the two Locals represent.\*

8. This pattern of identical, three-year collective bargaining agreements between Locals 680 (New Jersey) and/or 757 (New York) and Metropolitan area ice cream

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\* The Metropolitan area is defined by the agreements to cover New York City, Nassau and Suffolk Counties and 14 counties of northern New Jersey (Complaint, Exhibits B and C, par. 2(e)).

*Affidavit of David Campbell in Opposition to Motion*

manufacturers (hereinafter "the Employers") has existed since at least April 1, 1952 when the Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Trust Fund was created pursuant to a written Agreement and Declaration of Trust. (Exhibit A to the Complaint is a copy of the Agreement and Declaration of Trust as amended to January, 1970.) Originally and continuously to the present time the income of the Pension Fund has been derived from contributions made by the Employers pursuant to these agreements in respect of hours worked by their employees.

9. Pertinent Fund documents show that for the year ending April 30, 1969, employers who were contributors to the Pension Fund, in addition to Kraftco, were:

Abbotts Dairies Div. Fairmount Foods Co.  
Alderney Dairy Company  
Armel French Ice Cream Co.  
Armel Ice Cream Corp.  
Arnolds Ice Cream Co., Inc.  
Bartolini Ice Cream Co., Inc.  
Borden, Inc.  
Calip Dairies, Inc.  
Clinton Milk Company  
Colony Club Ice Cream Co.  
Consumers Ice Cream Corp.  
Costa Ice Cream Company  
Court Leigh Corp.  
Dairymen's League-Cooperative Association, Inc.  
Deems Ice Cream Corp.  
Dolly Madison Industries Inc.  
Fount-Wip of Newark, Inc.

*Affidavit of David Campbell in Opposition to Motion*

Gold Seal-Rivera Corp.  
Gold Star Ice Cream Co., Inc.  
Hohnekers Dairy  
Instantwhip-Newark, Inc.  
Jahns' Since 1897, Inc.  
Karl Droke Ice Cream Co.  
Lighthouse Ice Cream Corp.  
Marchiony Ice Cream Corp.  
Maurice French Ice Cream Corp.  
Mayflower Ice Cream Corp.  
Meadow Gold Products—Div. of Beatrice Foods Co.  
National French Ice Cream Corp.  
Northern Ice Cream Corp.  
Oak Point Creameries, Inc.  
Oak Point Dairies of New Jersey  
Penn Dairies, Inc.  
Priscilla Ice Cream Corp.  
Raritan Valley Farms, Inc.  
R&G Milk Products, Inc.  
Real Ice Cream Co., Inc.  
Lucy Ricciardi, Inc.  
Lucy Ricciardi Ice Cream Sales Corp.  
Senator Frozen Foods, Inc.  
Silver Crown Ice Cream Products Corp.  
Springfield Ice Cream Distributors  
Swift & Co., Inc.  
Twin County Ice Cream Corp.  
Universal Ice Cream Corp.  
Weissglass Gold Seal Farms, Inc.  
Whitehouse Dairy, Inc.  
Whitelawn Dairies, Inc.

*Affidavit of David Campbell in Opposition to Motion**The Newark Plant Closing*

10. The collective bargaining agreement covering the Breyer Newark plant contained the following provision:

“(e) The Company agrees for the term of this Agreement not to remove its manufacturing operations from the area of Local 680 and to continue to manufacture within the area of Local 680, and the Company, including any affiliates or subsidiaries, agrees that it shall not establish or operate a plant for production of ice cream or frozen dessert products outside of the Local 680 area for sale or distribution of such products in the Metropolitan Area;” (Complaint, Exhibit C, p. 8)

However, since this restriction applied only “for the term of this Agreement,” and since the collective bargaining agreement between Kraftco and Local 680 would expire on April 30, 1968, Kraftco would have been free on that date of any contractual restriction on the closing of the Breyer Newark plant. Any claim by the Unions to the contrary is clearly erroneous (affidavit of Samuel J. Cohen, Esq., sworn to October 21, 1970 (“Cohen Aff’t”) par. 11).

11. Nevertheless, Kraftco wished to negotiate with the Unions before any final decision on the closing was made. It wished to do so as part of its general obligation to bargain with its employee representatives, but also in the hope that the Unions would cooperate with any closing in such a way as to make it easier for Breyer to retain its northern New Jersey distribution. Local 680 represented the Newark production employees who would be directly concerned, but Local 757 also had an interest because of the proposal to use

*Affidavit of David Campbell in Opposition to Motion*

Breyer Long Island City production and Kraftco's desire to retain as many as possible of its Newark production employees at the Long Island City facility.

12. Kraftco's efforts to get the Unions to discuss the Newark situation began in early January 1968. With disingenuousness characteristic of their attitudes and actions in this matter, the Unions claim that when it "became known" that Breyer intended to close its Newark plant, "the Unions requested and Kraftco agreed to negotiate . . . before proceeding further with the negotiation of the terms and conditions of the renewal of the Ice Cream Industry Area-Wide Agreement" (Cohen aff't, pars. 9 and 11, p. 3). The truth of the matter is that Local 680 spurned Kraftco's repeated requests to negotiate. Negotiations about the Newark plant were not held until after Kraftco formally withdrew from the industry-wide negotiations and brought an unfair labor practice charge against Local 680 based on its refusal to bargain on the subject. Annexed hereto as Exhibit 1 is a copy of the charge filed by Kraftco with the N.L.R.B. on April 23, 1968.

13. Finally on April 25, 1968, the Unions represented by their attorneys Mr. Cohen and Mr. Parsonnette and their presidents, Mr. Clark and Mr. McGinley, met at the Sheraton Inn in New York with representatives of Kraftco, namely, James J. Leyden, Esq., of the Philadelphia firm of Schnader, Harrison, Segal & Lewis and Donald E. Mott of Breyer. Aaron Solomon, Esq., counsel for an informal industry negotiating group and co-counsel with Mr. Cohen to the Pension Fund, was also present. I was present in the Sheraton while these discussions were in progress and was kept abreast of them by Kraftco's representatives. The in-

*Affidavit of David Campbell in Opposition to Motion*

dustry negotiations on the new Industry Area-Wide Agreement were going on elsewhere in the same hotel. The industry negotiations were successfully concluded, with Kraftco as a signatory, after separate agreement was reached with the Unions on the Newark closing.

14. Submitted herewith is the affidavit of James J. Leyden, Esq., regarding what was said, and more importantly, what was not said, in the course of the Breyer Newark discussions. Exhibit F to the Complaint (Exhibit A to Mr. Cohen's Affidavit) is a memorandum of the agreement ("the Breyer Agreement") reached in the course of these discussions. I personally reviewed and approved the terms of the Breyer Agreement.

15. The Breyer Agreement provided that:

(a) Breyer could, on and after November 2, 1968,  
(i) discontinue production at the Newark plant and  
(ii) relocate its Newark distribution facilities to a new location in northern New Jersey from which it could sell ice cream products produced by Breyer in Long Island City.

(b) Breyer would pay each production employee who was permanently terminated one week's severance pay for each full year of service if the employee did not quit before production was finally terminated. Each such employee would be placed at the bottom of the Long Island City seniority list.

(c) With respect to the Pension Fund the following was provided:

"The consultants to the pension fund shall make an actuarial study of the impact, if any, of the dis-

*Affidavit of David Campbell in Opposition to Motion*

continuance of operations and the termination of the employees upon the pension fund as of the date of the discontinuance of such operations, the cost of which shall be borne jointly by the company and the fund. If the consultants to the fund determine that the fund has been adversely affected as a result of the discontinuance of operations by the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants. The decision of the consultants shall be final and binding on the parties."

*The Pension Fund*

16. The Pension Fund was created on April 1, 1952 to provide pension and other benefits for employees covered by collective bargaining agreements between Locals 680 and 757 and the Metropolitan area Employers. The Agreement and Declaration of Trust provided for equal Union and Employer representation on the Board of Trustees (Exhibit A to the Complaint, Article V, Section 9(a)).

17. The corpus of the trust consisted of payments initially made and thereafter to be made by the Employers pursuant to the several collective bargaining agreements and renewals thereof, together with any investment income derived therefrom.

18. The Agreement and Declaration of Trust directed the Trustees to formulate the provisions of "the pension program contemplated by Collective Bargaining Agreements, and any amendments or renewals thereof" (Exhibit A to the Complaint, Article III, Section 4). Thus, originally and continuously thereafter, the Industry Area-Wide

*Affidavit of David Campbell in Opposition to Motion*

Agreement severally adopted by the Unions and Employers controlled the kind of pension program to be adopted and maintained, both as to contributions and level of benefits.

19. The contributions and level of benefits established by the original collective bargaining agreements and all intervening renewal agreements, including the May 1, 1968 agreements, contemplated the payment of "normal cost" plus interest on "unfunded accrued liability."

20. The normal cost of the Pension Fund was determined under the "entry age normal cost" method. Under this method a level annual cost (adjusted for employee turnover and mortality) is calculated for each employee based upon his age at the time he was originally hired. This is an amount which, if it were contributed from the time of hiring until retirement, would, at an assumed rate of investment return on the amounts accumulated, build up sufficient assets to pay the retirement benefits established under the program. The sum of all these level annual costs for each employee is the annual normal cost of the fund.

21. The "unfunded accrued liability" of the Pension Fund arises from the fact that when the Pension Fund here was established there was a body of employees for whom no contributions had been made in the past but who were to receive some retirement credit for their years of past service with the Employers. As a result the fund was, in effect, short at the moment of its creation by the amount of annual normal costs that theoretically would have been contributed in respect of the years of past service credit allowed to such existing employees. This amount is called the unfunded accrued liability of the fund.

*Affidavit of David Campbell in Opposition to Motion*

22. It is true of any pension plan that unfunded accrued liability arises when at its creation the plan gives pension credit to employees for prior service with an employer. Sometimes arrangements are made to amortize or liquidate the unfunded accrued liability over a period of years by controlling the level of benefits so that annual contributions received will exceed the normal cost of such benefits by the amount necessary to effect the scheduled amortization.

23. This is most emphatically *not* what was done with unfunded accrued liability under the pension program adopted by the Pension Fund and continuously administered by the Union and Employer trustees of the Fund. Pursuant to the original and successive collective bargaining agreements, and consistent with accepted actuarial standards, it was decided in order to maximize the benefits payable in respect of the agreed Employer contributions that the this so-called "liability" was a theoretical amount for the unfunded accrued liability would *not* be amortized. Thus payment of which no one was liable. With the advice and approval of the Segal Company it was agreed that the principal amount of the unfunded accrued liability would be continued and that only interest would be paid on the principal amount.\*

24. Under this approach to funding, the ultimate ability of the Pension Fund to pay benefits at anticipated levels

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\* It should be noted that since unfunded accrued liability is a function of two variables, the level of benefits and the total number of years of prior service credit, the measurement of the unfunded accrued liability will increase if the level of benefits under the plan is increased. Benefits under the plan here have been increased from time to time over the years so that the unfunded accrued liability has increased correspondingly.

*Affidavit of David Campbell in Opposition to Motion*

into the indefinite future is predicated upon the assumption that people will continue to consume, and Employers will continue to manufacture and distribute ice cream in the Metropolitan area, and the ability of the Unions and Employers to continue to agree upon satisfactory contribution levels. The Unions and the Employers have continued the Fund on this basis and the Segal Company has likewise consistently endorsed this judgment.

25. The collective bargaining agreements dated May 1, 1968, which were entered into simultaneously with the Breyer Agreement specifically continued the Pension Fund on the same basis, i.e., normal cost plus interest on unfunded accrued liability, by providing that the "pension . . . program previously instituted . . . shall be continued during the term of this Agreement" (Exhibit D to the Complaint p. 53, Exhibit E to the Complaint p. 51). And in their actuarial valuation of the Fund as of April 30, 1968, which was based upon the improved benefits provided for by the new Industry Area-Wide Agreements, the Segal Company certified that "the income reasonably expected from future employer contributions will be sufficient, after expenses, to meet the normal cost and interest on the unfunded accrued liability with respect to all covered employees; . . ." Exhibit 2 hereto is a copy of the Segal Company's Actuarial Review for the indicated period. The quoted language appears in page 2 of the two-page Actuarial Valuation that is appended to this Review. This conclusion was based upon calculations which included the Fund's liability for all Breyer Newark employees who were on the pension rolls.

*Affidavit of David Campbell in Opposition to Motion**The "Impact, If any," of the Breyer Newark Closing*

26. When Kraftco and the Unions met on April 25, 1968 to discuss the Breyer Newark closing it was recognized that the discontinuance of operations in Newark and the resulting termination of production employees would affect the Pension Fund in that, first, it would result in a reduction in future contributions by Breyer in respect of the terminated employees, but secondly, the future obligations of the Fund in respect of such of the terminated employees whose pension rights had not yet vested would be eliminated, since by virtue of their termination before they were eligible to retire they would never make any claim against the Pension Fund.

27. It is apparent from Mr. Cohen's affidavit (par. 10, p. 3) that the Unions' understanding of the nature of the pension issue was the same as Kraftco's. Mr. Cohen says that the Unions recognized that the closing "would necessarily result in diminished employment and therefore diminished employer contributions to the Pension Fund, since contributions are based on hours worked." It is also true, as Mr. Cohen says, that the earlier retirement of terminated employees eligible to do so could affect the Fund's expenses to some extent. Most significantly, however, for what the Segal Company later did, is the fact that Mr. Cohen makes no claim that the Unions believed that the closing would have any impact on the liability of the Pension Fund for former Breyer employees who were already on the pension rolls. This is obviously the case since their pension rights had already vested and the Fund would have had to pay them whether or not the plant closed.

*Affidavit of David Campbell in Opposition to Motion*

28. Thus, as a matter of the intention of the parties to the Breyer Agreement as expressed in Mr. Cohen's affidavit, the question which was intended to be remitted to the actuaries for calculation was whether and to what extent the loss of future contributions in respect of all of the terminated production employees would be off-set by changes in the future obligations of the Pension Fund resulting from the early retirements and from the fact that the employees whose pension rights had not yet vested would never make a claim against the assets of the Fund.

29. In his deposition testimony Jack M. Elkin, the Segal Company actuary-in-charge, testified that on or before May 31, 1968 the Segal Company had decided what kind of study it would make under the Breyer Agreement. No representative of the Company consulted with any Kraftco representative in connection with this decision.

*Martin E. Segal Company's "Study"*

30. Production at the Breyer Plant was terminated as scheduled on November 2, 1968. Of the 96 employees who were employed at Breyer Newark, 55 had been employed in distribution and 41 had been engaged in production. The distribution employees, with certain exceptions, were transferred to Edison, New Jersey and continued their employment with the Company. Four of the 41 production employees transferred to Long Island City. One production employee obtained employment with another Employer in the Metropolitan area. The remaining 36 employees were permanently separated from the employ of Kraftco. It was to the "impact, if any," of these 36 terminations of production employees that the Segal Company determination should have been addressed.

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31. After the closing Kraftco heard no report of the Segal Company's activities in connection with the Breyer Agreement until on or after October 9, 1969 when the results of its purported study were sent in a one page letter to the Board of Trustees of the Pension Fund. Mr. Elkin of the Segal Company testified in deposition that the study itself was completed and the results reduced to writing on April 4, 1969.

32. The Segal study was not a calculation of the adverse effect of the closing as intended by the parties. Disregarding the fact that the Pension Fund was, with its explicit approval, maintained by the Unions and the Employers under an agreed funding method that precluded payment of unfunded accrued liability, the Segal Company would have required Breyer to pay the unfunded accrued liability associated with *all* Breyer Newark employees who were on the pension rolls before the Newark plant closed, including the Newark *distribution* employees who were not the subject of the Breyer Agreement.

33. Indeed, the Segal Company did not deal with the Pension Fund as such at all. Rather, it purported to create a "Breyer sub-fund" by approximating the contributions made by Breyer Newark over the 16-year history of the Fund, net of the estimated amount of benefits paid to Breyer Newark retirees, and subtracted that figure from the accrued liability in respect of all former Breyer Newark employees then on the rolls. In this fashion the Segal Company came to the conclusion that in order to procure an orderly termination of an unproductive facility, Kraftco had agreed to pay the Pension Fund approximately \$1 million, or about \$300,000 more than it had paid in con-

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tributions to the Fund during the entire 16-year history of the Fund and more than the entire Breyer Newark production payroll for the previous two years.

34. Even apart from this basic error in approach, the Segal Company made other errors, among them the following:

- A. Some of the pensioners had died prior to the completion of the study and the resultant savings were not taken into account.
- B. One employee considered as retired, had not retired and was actually working elsewhere in the industry generating contributions to the fund.
- C. The study failed to reflect contributions made by Kraftco between May 25, 1968 and the date of the closing, November 2, 1968.
- D. The Segal study gives credit to Kraftco for contributions to the Pension Fund in respect of Breyer Newark employees, but does not give credit for the income earned over the years on such contributions.
- E. It was improper for the Segal Company to use the interest rate assumption used for the Pension Fund on an ongoing basis when this study was predicated upon a termination analysis.

35. Submitted herewith is the affidavit of Preston C. Bassett, a Vice President and Actuary of Towers, Perrin, Forster & Crosby, Inc., a firm of independent consultants. His affidavit discusses the Segal Company study and its defects in more detail.

(Sworn to by David Campbell on December 8, 1970)

**Affidavit of James J. Leyden in Opposition to Motion**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

◆  
[SAME TITLE]  
◆

COMMONWEALTH OF PENNSYLVANIA }  
COUNTY OF PHILADELPHIA }  
  {ss.:

JAMES J. LEYDEN, being duly sworn, deposes and says:

1. I am a member of the bar of the Commonwealth of Pennsylvania and a partner in the Philadelphia firm of Schnader, Harrison, Segal & Lewis, who acted as counsel to defendant Kraftco Corporation in the matter herein-after mentioned.

2. I make this affidavit in opposition to the motion of plaintiffs in the within action for summary judgment and specifically in response to so much of the affidavit in support thereof of Samuel J. Cohen, Esq., sworn to October 21, 1970, as purports to characterize the nature of the negotiations of April 25, 1968, which resulted in the agreement between Kraftco and the Local Unions 680 and 757 regarding the closing of Breyer's Newark plant.

3. Mr. Cohen in paragraph 11 of his affidavit implies that it was understood that the Pension Fund would be affected "to a substantial degree" by the Breyer plant closing and that there was only "a difference of opinion between the Unions and Kraftco concerning the extent of such adverse impact . . .". The purported discussions

*Affidavit of James J. Leyden in Opposition to Motion*

covered by paragraph 11 of Mr. Cohen's affidavit could only have taken place at the Sheraton Inn in New York on April 25, 1968 because I am informed and believe that there was no prior discussion of the subject matter between the parties. I was present at the April 25 meetings and can affirm no such discussions took place.

4. Whether or not the Breyer Newark plant closing would affect the Pension Fund adversely was considered an open question at the April 25, 1968 negotiations. There was a recognition that the resultant decrease in future contributions might have an adverse effect if there were not sufficient offsetting reductions in the future obligations of the Fund. It was Kraftco's belief, based upon its own independent actuarial analysis, that there would be no adverse effect, that in fact the Fund would be benefitted by the closing.

5. While there was no explicit discussion of such matters at the April 25 meetings, the nature of the Industry pension program was well known to the Unions and Kraftco. Both sides knew that under the program a large unfunded accrued liability existed and that there was no provision for its amortization. At no point on April 25, 1968 was any discussion had with respect to the unfunded accrued liability of the Pension Fund or any alleged relationship of such liability to the Breyer closing. No suggestion was made by any person present that the closing of the Newark plant and resulting termination of employees affected the actuarial assumptions upon which the Fund operated. No one claimed that the closing could possibly affect the Fund's liability for pensioners already on the rolls.

6. It is significant to note, furthermore, that in the new collective bargaining agreements which were signed

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five days later (Exhibits D and E to the Complaint), the parties specifically agreed that the Pension Fund would continue to operate on the same basis as theretofore and, therefore, that no provision would be made to amortize or otherwise fund the unfunded accrued liability.

7. I regard the purported actuarial study of the Segal Company which would require Kraftco to pay the Pension Fund an amount necessary to fund an arbitrarily estimated "Breyer share" of the unfunded accrued liability as wholly non-responsive to and inconsistent with the intention of the parties to the Breyer Agreement and contradictory of the express terms of the currently effective collective bargaining agreements which impose no such obligation on any Employer participating in the Pension Fund.

(Sworn to by James J. Leyden on December 10, 1970)

**Affidavit of Preston C. Bassett in Opposition  
to Motion**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE]  
-----♦-----

STATE OF NEW YORK      }  
COUNTY OF NEW YORK    }ss.:

PRESTON C. BASSETT, being duly sworn deposes and says:

1. I am Vice President and Actuary of Towers, Perrin, Forster & Crosby, Inc., a management consulting firm specializing in advice on compensation and benefit arrangements, and, in particular, pension plans. I have been in the actuarial field for over 30 years and in the pension consulting area for over 20 years. During this time I have been consultant on pension matters to numerous corporations including Kraftco Corporation and several other major U.S. companies. In addition, I have worked on various industry and professional committees and have testified before various governmental bodies on matters affecting pensions, Social Security and Welfare Legislation. I am a Fellow of the Society of Actuaries, a Fellow of the Conference of Actuaries in Public Practice, a member of the American Academy of Actuaries, and a member of many other professional groups.

2. I make this affidavit in opposition to the motion of plaintiffs for summary judgment. The facts stated and

*Affidavit of Preston C. Bassett in Opposition to Motion*

opinions expressed herein are based upon my review of the following materials:

- (a) The Agreement of April 25, 1968 between Kraftco Corporation and Local Unions 680 and 757 which is annexed to the Complaint as Exhibit F ("the Breyer Agreement").
- (b) The Ice Cream Industry Agreement and Declaration of Trust which is annexed to the Complaint as Exhibit A ("the Agreement and Declaration of Trust") pursuant to which the Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Trust Fund ("the Pension Fund") was established and maintained.
- (c) The four collective bargaining agreements between Kraftco Corporation and the two Unions covering the periods May 1, 1965 to April 30, 1968 and May 1, 1968 to April 30, 1971 (Complaint Exhibits B, C, D and E).
- (d) The transcript of, and exhibits to, the deposition herein of Martin E. Segal Company ("the Segal Company") by Jack M. Elkin, Senior Vice President and Chief Actuary ("the Elkin Deposition").
- (e) The affidavit and exhibits thereto, of Samuel J. Cohen, Esq., sworn to October 21, 1970, in support of plaintiffs' motion ("Cohen Affidavit").
- (f) The affidavit, and exhibits thereto, of David Campbell, sworn to December 8, 1970, in opposition to plaintiffs' motion ("Campbell Affidavit").
- (g) The affidavit of James J. Leyden, Esq., sworn to December 10, 1970 in opposition to plaintiffs' motion ("Leyden Affidavit").

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Exhibits 15 and 16 to the Elkin Deposition were identified by Mr. Elkin as the actuarial study purportedly performed by the Segal Company pursuant to the Breyer Agreement. Exhibit 11 is a report of the results of the purported study and Exhibit 12 explains the calculations made by the Segal Company. Exhibits 18, 19 and 20 are three Annual Actuarial Reviews made of the Pension Fund by the Segal Company.

3. The purposes of this affidavit are the following:

- (a) to explain why the words used in the Breyer Agreement and in other related documents raise a substantial doubt that the parties intended a study of the type performed by the Segal Company;
- (b) to explain why the Breyer Agreement and such other related documents, when read against the Cohen, Campbell and Leyden Affidavits, indicate that a different study was intended by the parties;
- (c) to raise certain significant questions in regard to the appropriateness in any event of the Segal Company's approach to the situation presented by the Breyer Agreement, and
- (d) to show, even accepting the premises underlying the Segal Company's approach, that its calculations were improperly prepared and that its \$978,100 "deficit" may be overstated by as much as \$500,000.

THE PENSION FUND

4. It is important to point out at the outset that an actuary recommends but does not decide the amount of and

*Affidavit of Preston C. Bassett in Opposition to Motion*

the circumstances under which benefits are to be paid to beneficiaries of a fund, or when and in what amount contributions are to be paid into a fund, or the period over which unfunded accrued liability is to be amortized, if at all. These matters are decided by the parties who establish and maintain the plan and an element of choice is always involved. The parties to the fund must decide, or agree upon, principles and actuarial assumptions under which the fund is to operate. Using those principles and assumptions, the actuary gives his opinion as to whether the assets of the fund and such investment and contributed income as can reasonably be anticipated will be adequate, given the age, sex and other pertinent characteristics of the beneficiaries, to pay future benefits at the levels desired.

5. The Pension Fund here was created and maintained pursuant to the agreement of the Unions and the Employers as expressed in the Agreement and Declaration of Trust and the collective bargaining agreements referred to therein (Complaint, Exhibit A; Elkin Deposition, Exhibit 17). Administration of the Fund was committed to Trustees selected on the basis of equal representation by the Unions and the Employers. The Segal Company, as the Fund's actuarial consultants, originally and thereafter periodically, advised the Trustees whether in its opinion the contribution levels agreed upon from time to time in the collective bargaining agreements were sufficient to maintain the benefits contemplated by those same agreements, all based upon certain agreed upon actuarial assumptions and methods (Elkin Deposition, pp. 105-110). If during the course of these periodic reviews the Segal Company found that

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adjustments to benefits or contributions, or change in assumptions or methods were indicated, these could only be taken care of by the further agreement of the parties (*Id.*, and Campbell Affidavit, pp. 10-12).

6. The method used by the Pension Fund to analyze the relationship between contributions and benefits under the program adopted by the Pension Fund is the entry age level or normal cost method. This method has been adequately described by both Mr. Elkin (Deposition, pp. 105-6) and Mr. Campbell (Affidavit, pp. 8-11). This method is a well recognized actuarial technique and is in common usage throughout the United States today. The accountants in the Accounting Principles Board Opinion #8 while approving other actuarial methods, specifically mention this entry age level cost method and the background study to Opinion #8 actually recommends this method.

7. With the use of this method, there will normally be an unfunded accrued liability with respect to credit given to employees for services rendered by them prior to the effective date of the plan. The development of the unfunded accrued liability is described previously by Mr. Elkin (Deposition, pp. 105-7) and Mr. Campbell (Affidavit, pp. 9-10), and both point out that the parties to the Pension Fund have at all times agreed upon contributions to the Pension Fund sufficient only to cover the amount of the normal cost of the benefits for all employees, plus interest on the unfunded accrued liability.

8. It is quite proper in many situations and not at all unusual for the parties to a plan to decide not to fund the unfunded accrued liability but only to pay interest thereon

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as was provided under the arrangement here. The Internal Revenue Service provides that so long as contributions cover the normal cost plus interest on the unfunded accrued liability its contribution requirements for the continued qualification of the pension program will have been met. So long as the parties to the particular plan expect that the funding of the plan will continue indefinitely into the future, and the actuary finds no reason to challenge the reasonableness of that expectation, there is no need for the parties to arrange to fund the unfunded accrued liability. Under such an arrangement, therefore, this actuarially determined amount, although characterized as a "liability", is not such in the legal sense of the word because the parties have not undertaken any obligation to pay it now or in the future.

**THE BREYER AGREEMENT**

9. The words and phrases used by the parties to the Breyer Agreement to express the kind of actuarial determination they intended be made, namely "impact" and "adversely affected", have no particular actuarial significance. No conclusion as to their intended meaning could be reached within the four corners of the Breyer Agreement itself. More basically, one even has to go outside the Breyer Agreement to find out how the "pension fund" referred to is structured in terms of its actuarial assumptions, contributions, arrangements, etc.

10. If one examines the basic documents that give definition to the Pension Fund, such as the Agreement and Declaration of Trust, the collective bargaining agreements, the Segal Company's Annual Actuarial Reviews, etc., one finds

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a pension program characterized by the actuarial assumptions and methods described by Mr. Elkin (Deposition, pp. 105-110) and by Mr. Campbell (Affidavit, pp. 8-11).

11. One also finds evidence in such documentation that at least one meaning other than the one chosen by the Segal Company could have been attached to the words used in the Breyer Agreement to define the study intended. Article I, Section 1 of the Agreement and Declaration of Trust (Complaint, Exhibit A) provides with respect to subsequent entrants to the Industry plan that a new Employer may participate,

*“... provided that the extension of coverage to employees of such employer will not adversely affect the soundness of the Fund as determined by the Fund’s Actuaries.”* (page 1, emphasis added)

Mr. Elkin has described in his deposition the kind of study he would make under this language (pp. 133-144). Using the normal cost techniques employed by the Segal Company in its Annual Actuarial Reviews, Mr. Elkin says he would calculate the normal cost of the Fund plus interest on the unfunded accrued liability, first with the new employees excluded, and then with the new employees included. The difference in the costs so calculated would be a measure of the adverse effect of the new entrant’s joining the plan.

12. The only reason why an actuary would apply one method to study the impact of the entry of a new Employer and use another when asked to determine the impact of the exit of an Employer is that different approaches were intended by the parties or required in the circumstances.

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13. The Segal Company used a different approach to study the impact of the Breyer Newark terminations. What it did was to consider as immediately due and payable an amount equal to so much of a part of the unfunded accrued liability of the Pension Fund which it attributed to all Breyer Newark retirees, whether already on the pension rolls prior to the closing or going on thereafter. The inconsistency of this approach with the prior agreement of the parties not to fund the unfunded accrued liability is apparent. Furthermore it was explicitly agreed in connection with the May 1, 1968 collective bargaining agreement, negotiated at the same time as the Breyer Agreement, that the pension program would continue as before, which meant that no such funding would take place.

14. The approach taken by the Segal Company with respect to the Breyer closing is radically different from the approach which Mr. Elkin said he would use in response to the "adversely affect" language in the Agreement and Declaration of Trust. In the absence of evidence that the parties intended such a result, I can see no basis for construing such similar language in the Breyer Agreement in so different a fashion.

**THE INTENTION OF THE PARTIES**

15. If reference is made to the Affidavits of Mr. Cohen, Mr. Campbell and Mr. Leyden to supplement what the basic documents suggest about the intentions of the parties, it does not seem possible to conclude that the Segal Company study was what the parties intended by paragraph 3 of the Breyer Agreement. The parties appear to have been con-

*Affidavit of Preston C. Bassett in Opposition to Motion*

cerned with the reduction of future contributions in respect of the Newark production employees who would be terminated and relating that to the changes in the Fund's future obligations for these employees. (See Cohen Affidavit, page 3, paragraph 10; and Campbell Affidavit, pages 12-13, paragraphs 26-28.) This approach would involve comparing the present value of the future contributions that would have been paid in respect of the terminated employees and contrast that with the difference between the present value of benefits that would have been claimed in the future by terminated employees and the present value of benefits actually to be claimed by such terminated employees. This approach is predicated upon the ongoing nature of the Fund, which is obviously what the parties assumed.

16. The Segal Company's approach cannot be justified if the Affidavits accurately reflect the intent of the parties to the Breyer Agreement. The Segal Company calculation proceeds on the assumption that the parties contemplated funding a portion of the unfunded accrued liability of the Fund allocable to all Breyer Newark retirees. The concept of an unfunded accrued liability associated with the Newark facility alone is foreign to the nature of the Pension Fund. At all times the Fund has been a joint industry-wide venture with the contributions of all Employers being pooled in a single fund which bears the liability for the retired employees of all participating Employers. To split apart and carve out past contributions and past retirements from the 16-year old pool because the employees were once associated with the Newark facility is not consistent with the current or historical pension program established by

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the parties. Indeed, the April 30, 1968 Annual Actuarial Review by the Segal Company (Elkin Deposition, Exhibit 19), indicates that there was already sufficient money in the Pension Fund to provide the benefits for all retired employees, including former Breyer Newark employees. So radical a departure from past concepts and practices requires specific justification. No such justification appears. The Leyden Affidavit discloses that no discussion was had on April 25 with respect to the unfunded accrued liability.

17. The inappropriateness of the Segal Company approach is also demonstrated by the fact that were Kraftco now to contribute the \$978,100 calculated by the Segal Company, this would have the effect under the current program of either (a) decreasing the future contributions from the remaining Employers or (b) increasing the benefits above current levels established by the collective bargaining agreements for the remaining participants or (c) providing for the partial funding of the unfunded accrued liability. Alternatives (a) and (b) are the converse of an adverse effect and (c) would provide something that had already been agreed would not be provided for under the funding of the program.

18. The inconsistency and inequity of the Segal Company result is also attested to by the fact that the approximately \$1 million would be contributed by virtue of a calculation which takes as its predicate the need to separately fully fund all of the credited benefits for all prior employees of the Newark facility. If the approximately \$1 million were ear-marked for them, their benefits would be fully funded while the benefits for all other participants would not be. On the other hand, if the \$1 million were

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put into the Fund generally for the benefit of all employees in the fashion outlined in paragraph 17 above, Kraftco would be paying for the funding of the benefits of other employees with money purportedly necessary to guarantee the pensions of its own Breyer employees.

**THE SEGAL COMPANY CALCULATIONS**

19. Finally, even if it is assumed that the parties intended that the Segal Company make the study which it did make, the data, calculation procedures and methods used were incorrect to such an extent as to completely invalidate the results (Campbell Affidavit, pp. 13-16). Briefly, the most important matters are:

(A) In determining the Fund's liability in respect to Breyer's employees on the rolls, the calculations included retired Breyer employees who had never been engaged in production at the Newark plant and who could not be considered to have been affected by the discontinuance of production at Newark. The Fund's liability for such retirees should not have been included.

(B) While my firm has not had a chance to review all of the data in detail, it appears that certain data errors were made. For example, we believe that two employees classified as eligible to retire were also included among pre-existing retired employees and thus were included twice in the calculations; that one or more of the Breyer retirees had died prior to the date of the study and the resultant savings were not taken into account. There were several other such errors which significantly affected the results.

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(C) The study failed to give Kraftco credit for the Breyer Newark contributions which it made between May 25, 1968 and the date of the closing, November 1, 1968.

(D) Specific account was not taken of the facts, (i) that the contributions were invested and had earned interest since 1952, (ii) that expenses had been incurred and (iii) that certain death and termination benefits are provided by the Plan.

(E) The Segal Company used the 3% interest assumption used for the Fund on an ongoing basis while its study was predicated upon an analysis of the unfunded accrued liability being presently payable. Under such an approach an interest rate which was realistic in terms of today's cost of money should have been used.

20. A preliminary review which my firm has made indicates that if these adjustments were made, the net amount of the "deficit" purportedly payable by Kraftco could be reduced by as much as \$500,000.

21. Mr. Elkin, in his deposition, sought to justify some of the omissions referred to above by stating that he felt it sufficient to make approximations (Elkin Deposition, pp. 85-90). In most actuarial calculations it is proper to make certain kinds of estimates. In a continuing fund where contributions and benefits are continuously being paid and periodic readjustments are agreed upon in accordance with experience, there is always an opportunity to adjust for inaccuracies in earlier estimates. But in a one-time calculation of this nature where it is to be determined whether a fixed amount will be paid by one of the parties, it is the

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obligation of an actuary to make his calculations as precise as they reasonably can be made under the circumstances.

22. It appears that if the Segal Company had made a study of the type intended by the parties, Kraftco Corporation might not have been called upon to pay anything into the Pension Fund (Leyden Affidavit, p. 2 para 4). But even assuming the validity of the Segal Company's approach, its lack of precision could, as indicated, cost Kraftco Corporation \$500,000.

PRESTON C. BASSETT

(Sworn to by Preston C. Bassett on December 10, 1970)

**Opinion (Tyler, J.), Dated February 25, 1971**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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[SAME TITLE]

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COHEN, WEISS & SIMON, New York City, by  
SAMUEL J. COHEN, ESQ.,  
Attorney for Plaintiff Unions.

SULLIVAN & CROMWELL, New York City, by  
JOHN F. CANNON, ESQ.,  
Attorney for Defendant Kraftco Corporation.

**TYLER, D.J.**

This lawsuit concerns an agreement (hereinafter "Breyer Agreement") between Locals 757 and 680 of the Ice Cream, and Milk Drivers and Employees Unions, respectively, and Kraftco Corporation (hereinafter "Kraftco" or "the company") respecting Kraftco's liability to an industry-wide employees pension fund (the "Fund") on account of the termination of operations at its Newark, New Jersey plant. By way of summary judgment, the Union plaintiffs seek to enforce the determination of the actuary, Segal & Co., the Fund's consultants to whom the contract referred the liability question, that the plant closing "damaged" the Fund in the amount of \$978,100. Opposing summary judgment, defendants argue that the determination of the actuary reflects an egregious and unintended departure from the established method of assessing employer contributions to the Fund. At a hearing on January 11, 1971, the undersigned delivered orally an

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interim opinion setting forth the perceived deficiencies in the parties' (particularly plaintiffs') positions and suggesting that further evidence might be produced in support thereof. Both counsel declined further submissions, and, at their request, oral argument was heard on January 26, 1971.

The parties do not dispute that the initial and all subsequent industry-wide collective bargaining agreements provided that assessments be levied upon contributing employers based on the "entry age normal cost", plus interest on the "unfunded accrued liability". This method requires that for the working term of each employee, the participating employer contributes a determined amount, adjusted for turnover and mortality, which, at an assumed rate of investment return, will accumulate sufficient assets to pay the promised retirement benefits. In addition, the employer pays annual interest at the rate of 3% on the accrued liability, which consists of the sum of past service credit extended to existing employees at the inception of the Fund. These credits comprise a deficit of the Fund, an amount which increases along with benefit levels. This accrued liability was not to be amortized unless the participants or their representatives were to determine, with the advice of the actuary, that amortization is necessary to maintain the ability of the Fund to meet its continuing liability to pensioners. The accrued liability, then, constitutes only a theoretical or potential debt, dependent upon economic conditions generally and in the industry itself. Since it is acknowledged that the major portion of the Segal figure comprises a present assessment in respect of the unfunded accrued liability attributable to Kraftco's Newark employees, there is no question but that the assessment represents a departure, to some extent, from the traditional funding practice.

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The contest turns on (1) the extent to which this court is empowered to scrutinize the actuarial determination, and (2) the intended scope of the Breyer Agreement's submission to the actuary.

The company's challenge may fairly be characterized not as charging fraud or misconduct but gross error. There is little question but that were the Segal determination the product of an arbitral proceeding, it would be entitled to confirmation. Short of fraud or misconduct, errors of judgment or law are not subject to correction by the courts. *Shevell v. Besen*, 29 A.D.2d 751, 287 N.Y.S.2d 340 (1st Dept. 1968), *Korein v. Rabin*, 29 A.D.2d 351, 287 N.Y.S.2d 975 (1st Dept. 1968). Even resolution of ambiguity in the submission is for the arbitrators. *Matter of Colleti*, 23 A.D.2d 245, 260 N.Y.S.2d 130, 133 (1st Dept. 1965). Only if the construction adopted by the arbitrators defies all reason will an award be set aside. *Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd.*, 25 N.Y.2d 451, 306 N.Y.S.2d 934 (1969), *Matter of National Cash Register*, 8 N.Y.2d 377, 208 N.Y.S.2d 951, 955 (1960), *Matter of S & W Fine Foods*, 7 N.Y.2d 1018, 200 N.Y.S.2d 59 (1960).

Whereas arbitral awards are frequently before the courts for confirmation, judicial review of appraisals is rare. What little precedent there is for guidance, however, suggests, as the company urges, that review of appraisals is governed by different and broader standards. *Cohen v. Atlas Assurance Co.*, 148 N.Y.S. 563 (1st Dept. 1914), enumerated those factors which, if shown by clear and convincing evidence, would vitiate an appraisal:

... any inference or finding that the appraisal was not honestly made in good faith, and under the circumstances, with sufficient thoroughness and by

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*following the ordinary and only tests that could be applied.* (emphasis added) at 566.

In *Gervant v. New England Fire Insurance Co.*, 306 N.Y. 393, 128 N.Y.S.2d (1954), the New York Court of Appeals vacated an award because two of three appraisers refused to hear evidence on what the court deemed essential ingredients of a fire loss appraisal. The appraisers' rejection of such measures of loss as market value was held to be "misconduct in a legal sense," *supra* at 399. Although, framing the defect as legal misconduct, the *Gervant* court specifically refused to endorse the expedient of declaring appraisals and arbitrations subject to the same standards of review. *Supra*, at 399, 400.

Little support for plaintiffs' position that the court may not review an appraisal determination for reasonable correctness is found in the latest revision of New York procedure. New York CPLR § 7601. The object of the statute was to empower the courts to compel performance of an appraisal agreement, not to set standards for judicial confirmation. Moreover, the permissive language of section 7601, contrasted to the mandatory enforcement directed by section 7503 governing arbitrations, strongly suggests that the legislature intended to preserve certain traditional distinctions between the two processes. See discussion concerning *In re Delmar Box*, 309 N.Y. 60, 127 N.E. 808 (1955), *infra*. A court reviewing an agreement to arbitrate may only declare the contract void or compel arbitration. On the other hand, when reviewing an appraisal agreement, a court not only has the newly delegated power to compel appraisal, but retains as well the authority to substitute itself for the appraisers or to enforce the agreement as if it intended the accoutrements of arbitration. Practice Commentary to N.Y. CPLR § 7601 (McKinney

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1963). Thus, notwithstanding imprecise dicta equating the rights to challenge appraisals and arbitrations, the Court of Appeals gave effect to the permissive language of the statute by refusing confirmation of the appraiser's determination explicitly because confirmation lies in the discretion of the trial court. *Dimson v. Elghanayan*, 19 N.Y.2d 316, 280 N.Y.S.2d 97 (1967).

While not inconceivable that New York will follow those sister states which have accorded appraisal the same presumptive validity as arbitration, such a course would fly in the face of precedent and also, perhaps, good sense. The differences between the two processes were quite fully set forth by the present Chief Judge of the State's highest court in *In re Delmar Box Co.*, *supra*:

An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, upon which judgment may be entered after judicial confirmation of the arbitration award, Civ.Prac.Act, § 1464, while the agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action. See *Matter of American Ins. Co.*, 208 App.Div. 168, 170-171, 203 N.Y.S. 206, 207-208. Appraisal proceedings are, moreover, attended by a larger measure of informality, see *Strome v. London Assur. Corp.*, 20 App. Div. 571, 573, 47 N.Y.S. 481, 483, affirmed 162 N.Y. 627, 57 N.E. 1125, and appraisers are "not bound to the strict judicial investigation of an arbitration." See *Matter of American Ins. Co.*, *supra*, 208 App.Div. 168, 171, 203 N.Y.S. 206, 208. Arbitrators are required to take a formal oath, Civ.

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Prac.Act, § 1455, and may act only upon proof adduced at a hearing of which due notice has been given to each of the parties, Civ.Prac.Act, § 1454. They may not predicate their award upon evidence garnered through an ex parte investigation of their own, at least unless so authorized by the parties. See *Stefano Berizzi Co. v. Krausz*, 239 N.Y. 315, 146 N.E. 436. Appraisers, on the other hand, are not required to take an oath. See *Syracuse Savings Bank v. Yorkshire Ins. Co.*, 301 N.Y. 403, 411, 94 N.E.2d 73, 78; *Wurster v. Armfield*, 175 N.Y. 256, 264, 67 N.E. 584, 586; *Williams v. Hamilton Fire Ins. Co.*, 118 Misc. 799, 194 N.Y.S. 798. They are likewise "not obliged to give the claimant any formal notice or to hear evidence"; and they may apparently proceed by ex parte investigation, so long as the parties are given an opportunity to make statements and explanations to the appraisers with regard to the matters in issue. See *Kaiser v. Hamburg-Bremen Fire Ins. Co.*, 59 App.Div. 525, 530, 69 N.Y.S. 344, 347, affirmed 172 N.Y. 663, 65 N.E. 1118; *Townsend v. Greenwich Ins. Co.*, 86 App.Div. 323, 326-327, 83 N.Y.S. 909, 911-912, affirmed 178 N.Y. 634, 71 N.E. 1140; *Matter of American Ins. Co., supra*, 208 App.Div. 168, 171, 203 N.Y.S. 206, 208.<sup>1</sup>

Furthermore, in an arbitration, all the arbitrators, if there be more than one, "must meet together and hear all the allegations and proofs of the

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<sup>1</sup> In distinction to the procedures followed in insurance appraisals, no opportunity to make statements and explanations to the actuaries need be (nor was in this case) afforded. This factor underscores further the danger potential in shielding appraisals, to the same extent as arbitrations, from judicial scrutiny.

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parties". Civ.Prac.Act, § 1456. The standard appraisal clause, in contrast, specifically recites that the umpire is not to participate in the appraisal in all cases, but is only to pass on such differences as they may be between the appraisers designated by the respective parties. In addition, the vacatur of an arbitration award invariably results in a new arbitration, Civ.Prac.Act § 1462; see *Matter of Fletcher*, 237 N.Y. 440, 449, 143 N.E. 248, 251, whereas after an appraisal award has been set aside without any fault on the part of the insured, he is not required to submit to any further appraisement but is free to litigate the issues in an action at law on the policy. See *Gervant v. New England Fire Ins. Co.*, 306 N.Y. 393, 400, 118 N.E.2d 574, 577.

*Delmar Box* refused to give effect to a minor revision of the arbitration statute which arguably empowered the courts to compel performance of an appraisal agreement so long as the formalities of arbitration were observed. The absence of a clear legislative directive to change traditional judicial practice is as relevant here as it was in that case:

It is a cardinal principle of statutory interpretation that the intention to change a long-established rule or principle is not to be imputed to the legislature in absence of a clear manifestation. See *Homnyack v. Prudential Ins. Co. of America*, 194 N.Y. 456, 460, 87 N.E. 769, 771; *Seligman v. Friedlander*, 199 N.Y. 373, 376, 92 N.E. 1047, 1048. *Delmar Box*, *supra* at 66.

Analogously, absent a specific enactment by the legislature respecting the criteria for judicial review of appraisals, the

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settled practice of vacating an appraisal or actuarial determination for failure to follow the correct evaluative formula must be followed in this case.

Exception from this general rule might be permissible, however, if there was clear evidence that the parties intended to confer upon Segal & Co. the authority to resolve the ambiguity in the contractual language.<sup>2</sup> Contention to this effect is the mainstay of plaintiffs' case for summary judgment. Although adoption of this position would greatly simplify the court's task, the events surrounding execution of the Breyer Agreement do not support such an inference. It was conceded at the January 26 hearing that there was no discussion between the contracting parties concerning the meaning of "impact" or "adversely affected" or the extent of authority they intended to confer upon Segal. Two additional circumstances compel me to reject plaintiffs' contention: (1) this section of the Breyer Agreement was incidental to the major provision concerning severance pay, upon which the discussions focused; and (2) the problem submitted for evaluation involved not a tangible *res*, such as a house destroyed by fire, but an intangible projection which presented a question of first impression for this

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<sup>2</sup> Section 2 of the Breyer Agreement, the only portion relevant to this suit provides:

"The consultants to the pension fund shall make an actuarial study of the *impact, if any, of the discontinuance of operations and the termination of the employees upon the pension fund* as of the date of the discontinuance of such operations, the cost of which shall be borne jointly by the company and the fund. *If the consultants to the fund determine that the fund has been adversely affected as a result of the discontinuance of operations by the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants.* The decision of the consultants shall be final and binding on the parties. (emphasis added)."

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particular Fund. Therefore, I am constrained to find that the contractual language employed was inadvertently broad, easily susceptible to misunderstanding, and that it was not intended thereby to submit to Segal & Co. a problem of interpretation which exceeds the traditional scope and expertise of an actuary. Indeed, the company has made a strong showing that the actuaries gave virtually no attention to the problem of interpreting their charge.

Accordingly, the court holds that summary judgment must be denied and the issue remanded to the actuaries for redetermination pursuant to CPLR section 7601 and in accordance with the determinations hereinafter as to the proper execution of their commission.

Since both counsel declined the court's request for further submissions, the specific import of the contractual language must be determined by the court to the extent possible from the present record. Plaintiffs have proffered no evidence directly supporting the correctness of Segal's approach. The affidavit of Preston Bassett, Vice-President and Actuary of an independent consulting firm, submitted by defendant and the deposition testimony of Mr. Elkin, Segal & Co., chief actuary, establish beyond a peradventure that the Segal determination reflects an egregious departure from past funding practice. Specifically, I find that a present assessment of accrued liability attributable to Kraftco's Newark employees constituted error, in that it disregarded the basic decision not to amortize the accrued liability and imposed liability unequally upon Kraftco, particularly in view of Kraftco's continued participation in the Fund through its other plants.

Kraftco takes the position that the unfunded accrued liability should play absolutely no part in the determination of "impact" of the plant closing, and its affidavits, par-

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ticularly the Bassett affidavit, support that position. While that position may prove to be correct, the problem of the proper treatment of the accrued liability factor is too complex to dispose of on the basis of affidavits alone. Rather than substitute the court's judgment for that of the appraisers, I think it singularly appropriate to take advantage here of the latitude offered by N.Y. CPLR § 7601 to remand and enforce this appraisal "as if it were an arbitration". Therefore, remand procedure before Segal & Co. shall be attended by the formalities which normally accompany an arbitration proceeding, subject to waiver by stipulation of the parties. This will guarantee an opportunity to the parties to air their respective positions as to the appropriate method of computation.

In view of the imminent resumption of labor negotiations this spring, however, the court would not object to deferring the remand to permit the parties, with, perhaps, the advice of Segal & Co., to provide for proper disposition of this issue within the context of the industry-wide collective bargaining agreement which gave birth to the Fund itself. Counsel should inform the court if they wish to proceed in this manner.

Summary judgment is denied. The appraisal determination is vacated and remanded. Settle order accordingly.

Dated: New York, N. Y.  
February 25, 1971.

/s/ H. R. TYLER, J.  
U.S.D.J.

**Order Denying Motion for Summary Judgment,  
Vacating Determination of Actuary and Directing  
Redetermination by Actuary,  
Dated March 24, 1971**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
70 Civ. 1246 H.R.T.

◆◆◆  
[SAME TITLE]  
◆◆◆

Plaintiffs having moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment directing defendant Kraftco Corporation ("Kraftco") to pay the sum of \$978,100 to plaintiffs on behalf of the Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Fund (the "Pension Fund"), and said motion having come on to be heard before this Court on December 18, 1970, January 11, 1971 and January 26, 1971;

Now, upon reading and filing the Summons and Complaint, dated March 25, 1970, and the exhibits thereto, the Notice of Motion dated October 23, 1970, Plaintiffs' Statement pursuant to General Rule 9(g) of this Court, dated October 23, 1970, the affidavit of Samuel J. Cohen, Esq., sworn to October 21, 1970, and the exhibits thereto, the affidavit of Lawrence W. McGinley, sworn to December 28, 1970, the affidavit of Peter F. Clark, sworn to December 29, 1970, and the affidavit of Peter F. Clark, sworn to January 28, 1971, all submitted in support of said motion; and upon reading and filing the answer of defendant Kraftco, dated July 1, 1970, defendant Kraftco's Statement under General Rule 9(g) of this Court, dated December 11, 1970, the

*Order Denying Motion for Summary Judgment, Vacating  
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affidavit of David Campbell, sworn to December 8, 1970, and the exhibits thereto, the affidavit of James J. Leyden, Esq., sworn to December 10, 1970, the affidavit of Preston C. Bassett, sworn to December 10, 1970, and the deposition herein of Martin E. Segal Company ("Segal Company") by Jack M. Elkin (taken on July 10, 1970 and November 12, 1970), Thomas W. Fitzgerald (taken on November 23, 1970) and Irving McDougall (taken on November 23, 1970), and the exhibits thereto, all submitted in opposition to said motion; and plaintiffs and defendant Kraftco having been given an opportunity to submit further evidence in support of their respective positions and counsel having declined such opportunity; and due deliberation having been had thereon and the opinion of the Court having been filed on February 26, 1971, and the Court having found, among other things, that

1. The contractual language employed in paragraph 3 of the agreement dated April 25, 1968 between the plaintiff Unions and defendant Kraftco regarding the closing of the Breyer-Newark plant (Complaint, Exhibit F; the "Breyer Agreement") was inadvertently broad and easily susceptible to misunderstanding;
2. The events surrounding the execution of the Breyer Agreement show that the parties thereto did not intend to confer upon the Segal Company the authority to resolve the ambiguity in the contractual language or to submit to the Segal Company a problem of interpretation which exceeds the traditional scope and expertise of an actuary; and
3. The determination of the Segal Company with respect to impact upon the Pension Fund of the closing of the Breyer-Newark plant (Cohen Affidavit, Exhibit

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B) reflects a departure from past funding practice and is erroneous in that it disregarded the basic decision not to amortize the unfunded accrued liability;

Now, THEREFORE, pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, it is

ORDERED that plaintiffs' motion for summary judgment be and the same hereby is denied, and it is further

ORDERED that the determination of the Segal Company with respect to the impact upon the Pension Fund of the Breyer-Newark plant closing be and the same hereby is vacated, and it is further

ORDERED that the issue be remanded to the Segal Company to make the actuarial determination contemplated by the Breyer Agreement, such determination to be made under the following terms and conditions:

(1) The determination by the Segal Company shall, subject to waiver by stipulation of the parties, be attended by the formalities which normally accompany an arbitration under Article 75 of the New York Civil Practice Law and Rules;

(2) Prior to the commencement of any proceedings on the remand, the Segal Company shall identify as to date, place, parties and substance, all *ex parte* communications regarding the Breyer Agreement which it or anyone on its behalf may have had with any representative of either of the plaintiff Unions or of defendant Kraftco, or with any other party;

(3) All proceedings before the Segal Company shall be transcribed in full and the Segal Company shall

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prepare a written report setting forth and explaining, to the extent necessary to facilitate review by the Court, the data and other facts relied upon, the assumptions and analysis employed and the calculations performed;

(4) The determination and report shall be made only by an actuary of the Segal Company and shall be consistent with the funding practice of the Pension Fund prevailing at the time of the closing of the Breyer-Newark plant;

(5) The determination and report of the Segal Company shall be made in conformity with the Breyer Agreement as construed by the Court's opinion of February 26, 1971 and in this regard consideration may be given to the affidavits and exhibits of record on this motion;

and it is further

ORDERED that this Court retains jurisdiction of this action subject to further stipulation of the parties and orders of the Court.

Dated: New York, New York,  
March 24, 1971

/s/ H. R. TYLER, JR.  
U.S.D.J.

**Redetermination by Actuary, Dated August 27, 1973**

**I. HISTORY**

On April 25, 1968, an Agreement (hereafter referred to as the Breyer Agreement) was entered into by and between Sealtest Foods Division, National Dairy Products Corporation (now Kraftco Corporation) and Locals 757 and 680 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. The Agreement deals with the matter of Kraftco's right to discontinue production in its plant located in Newark, New Jersey, and in Section 3 states the following:

"3. The consultants to the pension fund shall make an actuarial study of the impact, if any, of the discontinuance of operations and the termination of the employees upon the pension fund as of the date of the discontinuance of such operations, the cost of which shall be borne jointly by the company and the fund. If the consultants to the fund determine that the fund had been adversely affected as a result of the discontinuance of operations by the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants. The decision of the consultants shall be final and binding on the parties."

In due course, the Segal Company made an actuarial study of the impact of the closing of the Newark plant on the Ice Cream Industry—Drivers and Ice Cream Employees Unions Pension Fund. The Segal study showed that the closing had an adverse effect on the fund in the amount of \$978,100, and this result was conveyed to the trustees of the fund in October 1969.

*Redetermination by Actuary, Dated August 27, 1973*

Subsequently, Kraftco (hereafter referred to as the Defendant) challenged the Segal calculation and refused to make payment. As a consequence, the Unions (hereafter referred to as the Plaintiff) brought an action in the U. S. District Court and made a motion for summary judgment in the amount set forth in the Segal study.

The motion was heard by Hon. H. R. Tyler, Jr., U.S.D.J., who denied the Plaintiff's motion for a summary judgment. The Court found that the calculation called for in the quoted section of the Breyer Agreement was in the nature of an appraisal rather than an arbitration and was, therefore, subject to review by the Court. Upon review, the Court found that the Agreement was ambiguous, that the Segal Company had not given sufficient consideration to its meaning, and that the actuarial calculation made was not in conformity with the construction placed on it by the Court. The Court noted, however, that the actuarial concepts involved were complex and, for this reason, hesitated to substitute its judgment for that of "the appraisers" (Opinion of Judge Tyler, February 25, 1971). Instead, the Court found it appropriate to remand the issue to the Segal Company for a further determination. The remand was set forth in an Order of the Court dated March 24, 1971.

## II. THE COURT ORDER

The Court Order of March 24, 1971, contained five instructions, which are set forth below:

"ORDERED that the issue be remanded to the Segal Company to make the actuarial determination contemplated by the Breyer Agreement, such determination to be made under the following terms and conditions:

*Redetermination by Actuary, Dated August 27, 1973*

- (1) The determination by the Segal Company shall, subject to waiver by stipulation of the parties, be attended by the formalities which normally accompany an arbitration under Article 75 of the New York Civil Practice Law and Rules;
- (2) Prior to the commencement of any proceedings on the remand, the Segal Company shall identify as to date, place, parties and substance, all *ex parte* communications regarding the Breyer Agreement which it or anyone on its behalf may have had with any representative of either of the plaintiff Unions or of defendant Kraftco, or with any other party;
- (3) All proceedings before the Segal Company shall be transcribed in full and the Segal Company shall prepare a written report setting forth and explaining, to the extent necessary to facilitate review by the Court, the data and other facts relied upon, the assumptions and analysis employed and the calculations performed;
- (4) The determination and report shall be made only by an actuary of the Segal Company and shall be consistent with the funding practice of the Pension Fund prevailing at the time of the closing of the Breyer-Newark plant;
- (5) The determination and report of the Segal Company shall be made in conformity with the Breyer Agreement as construed by the Court's opinion of February 26, 1971 and in this regard consideration may be given to the affidavits and exhibits of record on this motion."

The first three points called for by the Court's Order have been complied with.

*Redetermination by Actuary, Dated August 27, 1973*

With respect to points (4) and (5), it is noted that the proceeding before the Segal Company was conducted by its Chief Actuary, who made the determination contained in this report. Further, the Actuary finds that his determination is consistent with the funding practice of the pension fund prevailing at the time of the closing of the Breyer-Newark plant and that it is in conformity with the construction placed on the Breyer Agreement by the Court's opinion of February 26, 1971, as the Actuary understands that opinion.

### III. THE ACTUARY'S UNDERSTANDING OF THE COURT'S OPINION

In remanding the issue to the Segal Company, the Court did not set out precise instructions or guidelines for the Actuary. Inasmuch as the Actuary's understanding of what the Court had in mind is central to his finding, as set forth in this document, it is important to state at the outset his interpretation of the terms and conditions in the Court order.

The Actuary believes that the Court's instructions to him may be paraphrased in the following manner:

I find that the Breyer Agreement on which you based a calculation submitted to the trustees of the pension fund on October 9, 1969, is ambiguous. I believe that you did not give sufficient consideration to how that Agreement should be interpreted and that the interpretation placed upon it in making your calculation was erroneous. I do not believe that it was consistent with the previous funding practices of the pension fund. The Defendant has advanced its own interpreta-

*Redetermination by Actuary, Dated August 27, 1973*

tion of the Agreement and has outlined the method by which it believes the impact should be calculated consistent with that interpretation. At the same time, the Defendant has referred to a third interpretation which it says the Segal Company could have made. I recognize that the actuarial concepts involved in this matter are complex and I feel that a judgment rendered by an Actuary would, in all likelihood, prove more competent than one made by the Court. I am, therefore, ordering you to reconsider this matter in light of the opinion expressed by me and the arguments and affidavits submitted by the Defendant. I want you to hold a hearing on this subject, one that is attended by the formalities that attend an arbitration, at which both parties will be able to present their arguments and any further actuarial evidence they wish to submit. After the hearing has been held and you have had an opportunity to study the material submitted at the hearing and before this Court, take another look at the matter and submit your finding to the Court.

The Actuary's determination, given below, is made in accordance with this understanding of the assignment given to him by the Court and is based not only on the material delivered at and subsequent to the hearing, but on all of the earlier documents in the case.

**IV. THE HEARING**

Pursuant to the Court's Order of March 24, 1971, a hearing was held on February 1, 1973, before Martin E. Segal Company conducted by Jack M. Elkin, Senior Vice President and Chief Actuary.

*Redetermination by Actuary, Dated August 27, 1973*

A Record of the proceedings and accompanying Exhibits A-F, supplemented by the following communications:

Memorandum on behalf of plaintiffs—March 28, 1973

Memorandum of Kraftco Corporation—March 26, 1973

Reply memorandum on behalf of plaintiffs—April 5, 1973

Reply memorandum of Kraftco Corporation—April 6, 1973

Letter from John F. Cannon to Jack E. Elkin—April 12, 1973

are enclosed herewith and are submitted to the Court as part of this determination.

The Plaintiff did not offer any new information that would bear on the actuarial matters involved in this case. He renewed his disagreement with the Court's Opinion and, in fact, indicated that he was present at the hearing under protest.

The Plaintiff did not argue the merits of the original determination but held that "as a matter of law, in the absence of fraud or misconduct which were admittedly not involved in this case, the appraisal by Martin E. Segal Company was final and binding and could not be reversed on its merits." (page 71 Record of Proceedings). Any consideration of this argument, of course, lies outside the purview and competence of the Actuary.

The Plaintiff contended also that "Martin E. Segal Company should explain to the Court that the requirement that Kraftco pay for the deficit caused by its plant closing is in no respect inconsistent with the previous failure of the Trustees to require amortization. In fact, it is the only

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means by which a non-amortization program for the remainder of the employers might be maintained." (Plaintiff's memorandum March 23, 1973).

The Defendant did not offer any new information that would bear on the actuarial matters involved in this case. The arguments presented were substantially those that had been offered before the Court.

The Defendant advanced its own interpretation of the Agreement and, in accordance with that interpretation, argued that "the 'appropriate method of calculation' under the Breyer Agreement as construed by the Court is the method suggested by Mr. Bassett" (Defendant's memorandum March 26, 1973). At the same time, the Bassett Affidavit indicated a third meaning which could have been attached to the Agreement and, accordingly, a third method the Segal Company could have used to measure the impact.

The Actuary thus finds that he has before him three methods of calculating the possible adverse impact of the Newark closing on the pension fund. No other substantially different approach to the problem occurs to him, nor was any suggested by either party. The three approaches will be considered in Sections VI, VII, and VIII.

The nature of the legal proceedings to date precluded any argument by the Actuary with respect to the merits of the original Segal calculation. He does not deem it appropriate to remedy that lack at this time. However, before proceeding to an examination of the alternatives that lie before him, the Actuary does find it appropriate to set down some general remarks with respect to the operation of this pension fund and other similar funds. The Actuary believes that an understanding of this operation is necessary to any evaluation of the three methods of calculation.

*Redetermination by Actuary, Dated August 27, 1973***V. BACKGROUND OF THE ICE CREAM INDUSTRY—DRIVERS AND ICE CREAM EMPLOYEES UNIONS PENSION FUND**

The pension fund was established in 1951 as a collectively bargained, multiemployer, fixed contribution fund. That is, each participating employer obligated itself through its collective bargaining agreement with the union to contribute to the fund a specified amount (initially 5¢) for each hour worked by each of its employees. The joint labor-management board of trustees established in accordance with the trust agreement entered into by the contributing employers and the union proceeded, with actuarial advice, to put into effect a pension plan which could be supported by the fixed contribution. Decisions were first made as to the *types* of benefits that would be provided and the eligibility conditions under which they would be paid. Then, before the *level* of benefits could be determined, it was necessary to make a number of actuarial assumptions as to rates of withdrawal, death, and retirement, the rate of return that could be expected on invested assets, and the number of hours worked for which contributions could be expected. It was necessary also to decide on a funding policy, specifically, on the number of years over which it was intended to amortize the initial past service liability assumed by the fund.

The actuarial assumptions and the amortization period (initially 35 years) having been agreed on, the actuary proceeded to determine the level of benefits that could be supported, under the conditions specified, by the fixed contribution. The actuarial procedure by which the determination was made is known as the entry age normal cost method. Under this method, there is calculated for each covered employee the level annual contribution required

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during his working lifetime in order to fund the benefits that might accrue with respect to his service. The sum of these amounts for all employees is the normal cost of the plan. The excess at any point of the present value of future benefits for all employees and pensioners over the present value of future normal cost contributions is referred to as the past service liability, and the excess of that over the fund assets, as the unfunded past service liability. The actuarially required contribution for a year, or the annual cost, is the sum of the normal cost and the cost of amortizing (or simply meeting the interest payment on) the unfunded past service liability.

In establishing the relationship between the contributions agreed on in collective bargaining and the benefits they could support, the assumption was made, following the applicable Internal Revenue rulings, that the plan would be a permanent one, that is, that the collective bargaining agreement requiring the stipulated contributions would be periodically renewed into the indefinite future.

There was an implicit agreement, also, as there is in almost all plans of this type, that experience would be pooled. This means that no account would be taken of the age and service characteristics or of the withdrawal, death, and retirement rates of the employees of each employer separately, and that no effort would be made to determine whether the actuarial relationship between the contribution rate and the benefit level that holds for the plan as a whole would hold for each employer separately.

Over the years, as the collective bargaining agreements were renegotiated, the rate of contributions went through a succession of increases. Also, as conditions changed and as experience warranted, certain changes were made in the actuarial assumptions. For example, the assumption made

*Redetermination by Actuary, Dated August 27, 1973*

in 1951 that invested assets would earn  $2\frac{1}{2}\%$  was later changed to 3%. Finally, the trustees decided very early in the history of the plan to abandon the 35-year amortization schedule and to adopt instead the interest-only approach. This meant that they would allow the portion of the past service liability that had not yet been funded to be continued as a perpetual debt, not to be amortized and not to be increased. In determining the annual cost of the plan (or of any proposed revision of the plan) at any valuation date, one of the elements of the cost would be an annual interest payment on the unfunded past service liability rather than an amortization payment to cover interest and part of the principal. This method of funding assumes that the plan will continue in existence in perpetuity, always supported by the same number of employees working the same number of hours. It assumes, also, that if the industry were to experience a significant change such as a contraction in covered employment, the trustees would reconsider the level of benefits that could be supported by the new level of expected contributions.

Strictly speaking, it does not follow from the method of funding adopted that the unfunded past service liability would remain fixed, except in theory. The method of valuation followed by the actuary was to recalculate it at each valuation date, allowing it to absorb the effect of all variations between the actuarial assumptions and actual experience. An investment return above the assumed rate of interest, for example, or contributions for a greater number of hours than are required to meet the interest-only cost, other things being equal, would serve to reduce the unfunded liability, that is, to effect some degree of amortization, even though no obligation to do so was undertaken by the parties. On the other hand, continued unfavorable

*Redetermination by Actuary, Dated August 27, 1973*

actuarial experience would impair the ability of the fund to meet current benefit payments.

Each of the changes mentioned above, especially the increases in the rate of contributions, altered the balance between the value of present and future assets on the one hand and the value of future benefits on the other. As a result of periodic re-evaluations of that balance, it was found possible to effect a series of liberalizations of the pension plan, both in eligibility requirements and in amount of benefits. Each time, the level of benefits was set at the point where, on the basis of the current actuarial assumptions, an interest-only funding policy, and the assumption that the plan would continue indefinitely, they could be paid for by the current level of contributions.

The funding policy adopted presupposed that, if the actuary should find at some point that the level of contributions was falling short of that actuarially required, he would advise the trustees to take steps to remedy the imbalance, either by increasing the contribution rate or by decreasing the benefit. Neither of these steps would necessarily involve a change in funding policy. If he found that, even though contributions were meeting the actuarial cost, the liability for pensioners on the rolls was greater than the assets, he would again advise either an increase in contributions or a decrease in benefits. In this case, the result of taking either step would be that the contributions would then go further than meeting the normal cost plus interest on the unfunded liability; they would, in fact, effect some degree of amortization. If, on the other hand, he found that experience had been so favorable that contributions were exceeding requirements and pension liabilities were adequately covered by assets, he would advise the trustees, in accordance with their preference, how con-

*Redetermination by Actuary, Dated August 27, 1973*

tributions could be reduced or benefits increased, or he would simply inform them of the extent to which amortization of the liability was taking place.

In any event, it is clear that the actuarial cost method and the funding policy are not applied for the purpose of determining an assessment to be levied on contributing employers. Rather, the contribution rate being fixed by negotiation, they are applied to determine the nature of the pension plan that can be supported on a sound basis.

It may happen, after a multiemployer plan of this type has been in operation for some time, that an employer ceases to make further contributions and terminates its coverage. Assuming that the employer did not enter into any special agreement, superseding the trust agreement or the regular collective bargaining agreement, for the payment of benefits or for the payment of any penalty or reimbursement to the fund, several courses are open to the board of trustees for dealing with this situation, of which the following are the chief examples:

1. It may take no specific action beyond simply awarding benefits (immediate or deferred) to those of the employer's employees who are eligible and apply for them, continuing to pay benefits to those previously retired, dropping from coverage those who do not continue in the industry, and continuing in coverage those who find jobs with other participating employers.

2. It may impose a limitation on benefits to be paid to the affected employees. It may, for example, assume the obligation to continue full pension payments to those employees of the employer who are already on the pension rolls, set aside some portion of the fund's assets judged to be attributable to employees of the

*Redetermination by Actuary, Dated August 27, 1973*

employer who have not yet retired, and pay the vested benefits of these latter employees only up to the limit of that portion. If the assets were more than sufficient to pay the full vested benefits, the excess, of course, would remain with the fund.

3. It may impose a limitation on benefits in a different manner. It may reconstruct the history of the terminated employer's participation in the fund by determining the value of its contributions and the value of the benefits paid to its employees and applying only the excess contributions, if any, toward further payments both to its pensioners and to its employees not yet retired. Again, if the excess contributions more than covered the payments, the balance would remain with the fund.

The specific procedure that is adopted may be prescribed in the plan or trust agreement or the trustees may act under a general discretionary authority granted by the plan or the agreement. Any one of the three described procedures may, depending on the circumstances, leave the fund in a more or less favorable position than it was in before the determination—i.e., the new actuarial per capita cost may be lower or higher than the old.

On previous occasions, when an employer terminated its participation, the trustees followed the first course, without regard to whether it resulted in a strengthening or a weakening of the actuarial balance. In the absence of special agreements, they simply applied the normal rules and regulations of the plan; they imposed no penalties and modified no benefits. In the present case, however, a special agreement does exist. Although the exact meaning of this agreement is in dispute, it is clear that it establishes a different

*Redetermination by Actuary, Dated August 27, 1973*

method of handling the Breyer termination than the one applied to other terminations in the past.

The Breyer Agreement states merely that "the consultants to the pension fund shall make an actuarial study of the impact, if any," on the fund resulting from the plant closing. The Segal calculation referred to represented an effort to determine that impact. The appropriateness of that calculation has been questioned and suggestions with respect to a proper method of calculation have been made. The three methods referred to in Section IV will now be examined.

#### VI. THE SEGAL CALCULATION

The Segal Company proceeded with its calculation of 1969 on the basis of its understanding of the Breyer Agreement, with no instructions from the trustees or either of the parties. As the Plaintiff indicated at the proceeding, no effort was ever made by the Defendant to direct Segal in making the calculations. Although the Defendant has now offered its own interpretation of the Agreement, it comes after the fact of the calculation.

The approach taken by the Segal Company was to reconstruct the history of the Newark plant as a participant in the fund. The total contributions made by the employer with respect to Newark employees was measured against the sum of the benefits already paid and the liabilities for future benefits which the plan had incurred or would incur with respect to these employees. By following the procedure described in the Elkin deposition, the Segal Company found that there was a contribution deficit of \$978,100, and this

*Redetermination by Actuary, Dated August 27, 1973*

was taken as a measure of the adverse impact of the Newark closing on the pension fund.\*

The Actuary finds that the Segal Company calculation was based on a reasonable method of giving effect to the Agreement. (A number of pension funds he is familiar with have, in fact, incorporated into their rules and regulations a provision for dealing with a terminating employer in precisely this fashion.) He concedes, however, that another actuary, presented with the same situation, might take a different approach from that taken in the Segal deter-

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\* In the hearing before the Court, the Defendant claimed that, even if the Segal Company's interpretation was proper, its method of calculation was faulty (because it assumed that certain neglected elements would approximately balance each other in their net effect) and was based on incomplete data. (Bassett Affidavit, Section 19, pp. 11-12). As it happens, the Segal Company had made a revised calculation in June 1970 in accordance with the same interpretation as before but on the basis of corrected data supplied by the fund office and with recognition given to the neglected elements involved in the approximation—administration expenses and investment earnings over the entire history of the fund and employer contributions from May 1968 to the date of closing. The result of that calculation was not to decrease Kraftco's liability, as believed by the Defendant, but to increase it from \$978,100 to \$1,110,500. An explanation of the components entering into the determination of the new figure is set forth in Appendix 1.

The new determination takes into account all the technical criticisms made by the Defendant except for one which is deemed not valid, namely, that recognition was not given to the savings resulting from the death prior to the date of the study of one or more of the Breyer retirees. When an actuary calculates the present value as of a certain date of a projected benefit to be paid in the future to a person known to be alive on the valuation date, he makes an allowance for mortality. That is, he assigns certain probabilities that the recipient of the benefit will die in the first, second, third, etc. year and discounts the dollar value of the expected payments in each year accordingly. The fact that the recipient has died by the time the calculation is made is irrelevant; it does not change the actuarial value as of the date with respect to which the value was calculated.

*Redetermination by Actuary, Dated August 27, 1973*

mination, which, in effect, eliminated the relative advantage that had accrued to Kraftco from having participated in the multiemployer fund instead of maintaining a separate pension fund. This advantage existed because the age, service and other characteristics of its employees made them a relatively more costly component of the multiemployer fund than those of the average employer and, from the nature of the multiemployer fund, its higher cost was averaged out over all the employers.

The Defendant argued that the advantage should remain with Kraftco and that the other participants should not now be made whole for the additional cost they bore during the period of Kraftco's participation in the plan. By arguing for the original appraisal, the Plaintiff is contending for an interpretation of the Agreement that would accomplish precisely the result the Defendant objects to. From that point of view, the Segal calculation was the only one that could have been made. The Defendant's position is that this could not have been intended by Kraftco. In any event, the Agreement does not provide explicit guidance for a resolution of this particular issue.

The Defendant has argued that a requirement that a calculated liability for Kraftco be paid in a lump sum would represent a departure from past funding practice. Two points may be noted in this connection.

First, the Kraftco liability is not of the same nature as the unfunded liability remaining for the other participants. The fund's unfunded liability represents the amount by which future contributions added to present assets fall short of meeting future benefits. The policy of paying interest only on that amount is predicated on the fund's receiving in perpetuity the same amount of contributions each year for the same number of employees. Kraftco, on

*Redetermination by Actuary, Dated August 27, 1973*

the other hand, has discontinued its contributions and, under the Agreement, is to be assessed a sum of money to recompense the fund for any adverse impact resulting from that discontinuance.

Second, and in any event, the Segal Company determination of Kraftco's liability did not carry with it the presumption that it necessarily be paid in a lump sum. It could, as far as the fund is concerned, be treated as a debt with the fund receiving payments to liquidate it over a period of time.

#### VII. DEFENDANT'S PROPOSED CALCULATION

The Defendant offered a different interpretation, enunciated by its own actuary, of the intentions of the parties to the Agreement. The affidavit offered in evidence states in part:

"The parties appear to have been concerned with the reduction of future contributions in respect of the Newark production employees who would be terminated and relating that to the changes in the Fund's future obligations for these employees. . . . This approach would involve comparing the present value of the future contributions that would have been paid in respect of the terminated employees and contrast (sic) that with the difference between the present value of benefits that would have been claimed in the future by terminated employees and the present value of benefits actually to be claimed by such terminated employees. This approach is predicated upon the ongoing nature of the Fund, which is obviously what the parties assumed." (Bassett Affidavit, Section 15, p. 9)

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This approach may be paraphrased as follows: The fund will lose certain contributions as a result of the closing. On the other hand, it will save some benefit payments that might otherwise have become payable. The difference is a measure of the impact.

Using the same corrected information from the fund office that was referred to above, the Actuary has made a calculation to measure the impact under this approach to the question. The calculation (the details are set forth in Appendix 2) shows that, if there had been no closing, then, with respect only to the terminated employees, the fund would have received additional contributions and would have paid additional benefits having values as of January 1, 1969, of \$327,800 and \$192,000, respectively. The difference, adjusted to the date of closing, is \$135,100. The Defendant stated that Kraftco would expect to pay in a lump sum whatever amount resulted from this calculation. (Memorandum of Kraftco Corporation, March 26, 1973, pp 8-9)

The Actuary does not find this approach an acceptable interpretation of the Agreement.

The Defendant's proposal leaves out of account the Breyer employees who had retired before the closing date and were still on the pension rolls. If Breyer had continued to make contributions, part of those contributions would have been available, under the funding scheme in operation, to pay their pensions for the remainder of their lives. If the proposal is adopted, the cost of the pension benefits still due will have to be absorbed by the remaining contributors to the fund. It will be seen from Appendix 1 that the value, as of the date of closing, of payments still to be made to persons already receiving pensions exceeded \$1,000,000.

The Actuary finds that this added burden on the remaining contributors is a significant part of the total im-

*Redetermination by Actuary, Dated August 27, 1973*

pact of the plant closing and that the Defendant's proposal, by ignoring it, therefore does not provide a full measurement of the impact. Inasmuch as the Agreement does not stipulate that the burden was to be met by eliminating or reducing benefits on the one hand or increasing the payments of the remaining contributors on the other hand, the Actuary is constrained to believe that the Agreement must mean that this burden is to be met in some manner by Kraftco.

It is of interest that, if the Breyer case were enlarged—that is, if a large number of contributing employers were to terminate and the Defendant's formula applied—the fund would soon be in bankruptcy and would have to default not only on the accrued benefits of active employees but on a sizable portion of the current pension payments. Since such an adverse effect can flow from a partial termination of the pension fund if its rules were applied without modification, the presence of a special agreement leads the Actuary to the belief that it was intended to mitigate that potential effect in the present case.

The significance of these remarks can be fully understood only with reference to the funding method under which the plan had been operating. The effect of installing a pension plan with a large initial past service liability and then pursuing a policy of keeping that liability unfunded is that each generation of employees after the original group must be contributed for in amounts sufficient, not only to fund its own benefits, but also to pay interest on the initial liability. In other words, the fund is always counting on future contributions to pay for benefits obligated in the past. Since the termination of the fund, or of a major part of it, would necessitate the forfeiture of substantial benefit rights already earned, its actuarial solvency

*Redetermination by Actuary, Dated August 27, 1973*

is predicated on its continued existence into the indefinite future. Consequently, although the Defendant believes that its "approach is predicated upon the ongoing nature of the fund, which is obviously what the parties assumed", it is precisely because this approach ignores the ongoing nature of the fund that the Actuary, agreeing that that was what the parties assumed, finds the proposal unacceptable.

### VIII. AN ALTERNATE METHOD

Although arguing in favor of the method just described, the Defendant contended that "at least one meaning other than the one chosen by the Segal Company could have been attached to the words used in the Breyer Agreement to define the study intended." (Bassett Affidavit, p. 7) That other meaning implies a third and different approach to the actuarial calculation. Although this possible approach was not pursued by the Defendant during the course of the hearing, the Actuary is of the opinion that it is well worthy of pursuit.

The Bassett Affidavit continues as follows:

"Article I, Section 1 of the Agreement and Declaration of Trust (Complaint, Exhibit A) provides with respect to subsequent entrants to the Industry plan that a new Employer may participate,

'... provided that the extension of coverage to employees of such employer will not *adversely affect the soundness of the Fund as determined by the Fund's Actuaries.*' (page 1, emphasis added)

Mr. Elkin has described in his deposition the kind of study he would make under this language (pp. 133-144). Using the normal cost techniques employed by

*Redetermination by Actuary, Dated August 27, 1973*

the Segal Company in its Annual Actuarial Reviews, Mr. Elkins says he would calculate the normal cost of the Fund plus interest on the unfunded accrued liability, first with the new employees excluded, and then with the new employees included. The difference in the costs so calculated would be a measure of the adverse effect of the new entrant's joining the plan."

In short, the Elkin deposition stated that one way of measuring the possible adverse effect of a new employer's entrance into the plan would be to determine the amount, if any, by which the actuarially required rate of contribution is increased as a result. The Defendant suggested that a similar approach could have been taken to the Breyer closing.\* In other words, there is a clear suggestion here that the Segal Company could have determined the actuarial cost of the plan immediately before and then immediately after the closing and used the difference between the two determinations to demonstrate the impact of the closing.

The Actuary finds that this approach is an appropriate one and has pursued it with the necessary calculations in accordance with the actuarial assumptions and funding method in effect at the time of the closing.

The Actuary first compared the annual per capita actuarial cost of the plan as of April 30, 1969 (the first

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\* The Elkin deposition described also a second method by which the potential impact of a new employer's participation could be measured, namely, by a comparison of the contributions that could be expected from the new employer during the first collective bargaining agreement with the liability the fund would incur for the lifetime benefits to employees who might retire during the same period. The Defendant ignored the reference to this second type of determination, which would be analogous to the one used in the original Segal Company study.

*Redetermination by Actuary, Dated August 27, 1973*

valuation date following the plant closing) with what would have been the actuarial cost if the plant had not closed. The amounts arrived at are \$774.71 and \$766.52, respectively. Thus, according to this calculation, the effect of the closing was to increase the per capita actuarial cost by slightly more than \$8 per year. The Actuary then determined what additional assets the fund would have had to acquire, as of the date of closing, in order that the per capita actuarial cost, after the closing would have remained at \$766.52. The amount was found to be \$539,300. Since these cost figures do not include the termination benefit, the Actuary determined also the additional assets required to bring the termination benefit account to the same level, per capita, as before. That amount came to \$37,400, bringing the total to \$576,700. (The details entering into the calculations are set forth in Appendix 3.)

The significance of the determination lies in showing that if \$576,700 had been acquired by the fund on the closing date, it would have been in the same actuarial position (as measured by the balance between expected income and expected benefits) as it would have been in if the Breyer plant had not closed, that is, the impact of the closing would have been offset.

The Actuary finds this third approach to the question a valid one. It deals with the problem more directly than either of the other two procedures considered by posing the necessary questions in the simplest possible form: How does the situation immediately after the closing differ from that immediately before? If the situation has deteriorated, which would mean there has been an adverse impact, how can the result be rectified?

This approach does not, as does the first, deprive Kraftco of the advantages already accrued to it in the past by

*Redetermination by Actuary, Dated August 27, 1973*

virtue of its participation in a pooled-risk fund. On the other hand, it does not, as does the second, impose on other employers a burden they would not have had but for Kraftco's termination.\*

#### IX. CONCLUSION

Aside from calculations, the Actuary has few facts at his disposal in arriving at a determination of this case. The one central fact is the Breyer Agreement itself, but its meaning is the essential question that is in dispute. The Plaintiff contends that the meaning cannot be disputed and that the original interpretation by the Segal Company must be upheld. The Defendant contends that the Segal interpretation was in error in that it was contrary to the intention of the signatory parties, as that intention was defined by the Defendant after the fact of the original appraisal. The Defendant, while making two different suggestions as to how the Agreement might have been interpreted by the Segal Company, holds that one of these suggestions was clearly intended by the Agreement. The Court has found that the original Segal interpretation was inappropriate. In short, all parties have placed a different construction on the language of the Agreement and the Actuary finds that, if he is to make the determination ordered by the Court, some interpretation of the meaning of the Agreement must first be made. Otherwise, no calculation of any kind would be possible. In arriving at his finding with respect to this

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\* It is of more than theoretical interest to note that, if Kraftco had been an average employer, with the same experience as to turnover, mortality, retirement, etc. as the fund as a whole, the amount determined by the original Segal calculation would have been precisely the amount now determined by the third approach.

*Redetermination by Actuary, Dated August 27, 1973*

matter, as summarized below, the Actuary has felt himself bound by the language of the Court both in its Opinion and its Order as well as by the various arguments, affidavits, depositions, and other material submitted by both parties and the Fund Office.

1. The Actuary finds that the original Segal calculation represents a reasonable interpretation of the Breyer Agreement. He also acknowledges that it could be interpreted differently so as not to undo all of the advantages that had accrued to Kraftco during the period up to the date of closing that it had, under the terms of the original trust agreement, been pooling its risks with all other employers. In any event, it is the Actuary's understanding that he is precluded by the action of the Court from making a determination and award based on the original Segal calculation.
2. The Actuary finds that the method proposed by the Defendant is not based on a valid interpretation of the Agreement. This method is too narrow in its scope in that it fails to take into account the pensioner burden left on the fund as a result of the closing, and therefore does not fully measure its impact.
3. The Actuary finds that the third method of calculation, the alternative suggested by the Defendant, is based on a valid interpretation of the Agreement and approaches the problem of measuring the impact most directly. Bearing in mind the Court's injunction with respect to the original Segal calculation, the Actuary finds that this third approach to the actuarial study called for in the Agreement is the most appropriate one and herewith recommends that the finding based on that study be accepted by the Court.

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*Redetermination by Actuary, Dated August 27, 1973*

Based on the foregoing, the Actuary finds that the pension fund was adversely affected as a result of the discontinuance of operations by Kraftco at its Newark facility and determines that, as of the date of discontinuance, the amount to be paid to the fund by Kraftco, in accordance with the Breyer Agreement, was \$576,700.

Respectfully submitted,

**MARTIN E. SEGAL COMPANY**

By: S/JME

**Jack M. Elkin, A.S.A., F.C.A., M.A.A.A.**  
**Senior Vice President and Chief Actuary**

## APPENDIX 1

## REDETERMINATION OF BREYER DEFICIT

1. Contributions, net after administration expenses ..	\$ 963,700	(a)
2. Benefit payments .....	525,600	(b)
3. Net allocable assets .....	438,100	(c)
4. Liability—total .....	1,554,200	
(i) Pensioners and beneficiaries .....	1,009,500	(d)
(ii) Laid-off employees eligible for pension .....	481,700	(e)
(iii) Laid-off employees eligible for termination benefit .....	63,000	(f)
(iv) Laid-off employees ineligible for benefit .....	—	(g)
5. Deficit as of January 1, 1969 .....	1,116,100	
6. Deficit adjusted to November 2, 1968 .....	1,110,500	

## Notes:

- (a) Contributions by fiscal year derived from Exhibits 9 and 10. Interest allowed through 1968 at average rates earned by fund, including realized gains; offset taken for administration expenses at same percentages of contributions as were applicable to fund.
- (b) Benefit payments through January 9, 1969, allocated to individual years in same proportions as total fund benefits and interest allowed in (a).
- (c) No adjustment made for difference between cost and market value.
- (d) Calculated as of January 1, 1969, for 48 pensioners and 2 beneficiaries; liabilities determined as life annuities with allowance for remaining periods certain. Data in Appendix 1(a) and (b).
- (e) 17 employees laid off due to closing and not again in covered employment as of June 30, 1969 (15 awarded pensions by end of 1969). Data in Appendix 1(a) and (b).
- (f) 13 employees laid off due to closing, not again in covered employment as of June 30, 1969, and not paid termination benefit as of January 1, 1969. 9 employees paid termination benefit by June 30, 1969. No account taken of additional liability for accrued pension credits if remaining employees do not apply for termination benefits but find employment elsewhere under coverage of fund. Data in Appendix 1(a) and (b).
- (g) 10 employees laid off due to closing and not again in covered employment as of June 30, 1969. No account taken of liability for accrued pension credits if employee finds employment elsewhere under coverage of fund.

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## APPENDIX 2

PRESENT VALUE OF FUTURE CONTRIBUTIONS  
IN EXCESS OF ADDITIONAL LIABILITIES

1. Present value of future contributions that would have been paid for terminated employees .....	\$327,800 (a)
2. Present value of future benefits that would have been claimed by terminated employees .....	979,900 (a)
3. Present value of benefits actually payable .....	787,900 (b)
4. Excess of 2 over 3 .....	192,000
5. Excess of 1 over 4 .....	135,800
6. Item 4 adjusted to November 2, 1968 .....	191,000
7. Item 5 adjusted to November 2, 1968 .....	135,100

Notes:

- (a) Calculated as of January 1, 1969, for 49 employees active as of date of closing (40 employees as described in notes (e), (f) and (g) of Appendix 1 plus 9 pensioners included in data for item 4(i) who retired between date of closing and January 1, 1969).
- (b) Item 4(ii) and 4(iii) of Appendix 1 plus liability for 9 employees awarded pension from date of closing to January 1, 1969. No account taken of liabilities described in notes (f) and (g) of Appendix 1.

## APPENDIX 3

DETERMINATION OF ADDITIONAL ASSETS REQUIRED  
TO LEAVE PER CAPITA COST UNCHANGED

Figures for Items 1-8 are exclusive of termination benefit.

1. Annual contribution requirement as of April 30, 1969 .....	\$1,528,500 (a)
2. Item 1 per capita .....	774.71 (b)
3. Annual contribution requirement as of April 30, 1969, for Breyer employees on assumption plant remained in operation and employees remained active .....	43,100 (c)
4. Annual contribution requirement as of April 30, 1969 for Breyer employees inactive as of December 31, 1968, but included in Item 1 .....	21,700 (d)
5. Total annual contribution requirement as of April 30, 1969, on assumption Breyer plant remained in operation .....	1,549,900 (c)
6. Item 5 per capita .....	766.52 (e)
7. Additional assets required as of April 30, 1969, to maintain Item 6 per capita cost .....	547,400
8. Item 7 adjusted to November 2, 1968 .....	539,300
9. Termination benefit account as of April 30, 1969	148,300 (f)
10. Item 9 per capita .....	75.16 (b)
11. Termination benefit account as of April 30, 1969, on assumption Breyer plant remained in operation	190,900 (g)
12. Item 11 per capita .....	94.41 (e)
13. Additional assets required as of April 30, 1969, to maintain Item 12 per capita assets .....	38,000
14. Item 13 adjusted to November 2, 1968 .....	37,400
15. Total additional assets required November 2, 1968	576,700

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*Notes:*

- (a) Net annual contribution requirement of \$1,470,200 as shown in actuarial report as of April 30, 1969, plus administrative expense of \$58,300.
- (b) Based on 1,973 active employees.
- (c) See note (a) of Appendix 2.
- (d) 17 inactive employees eligible for pension (Note (e) of Appendix 1) plus 9 pensioners awarded between date of closing and January 1, 1969 (Note (f) of Appendix 1).
- (e) Based on 2,022 active employees.
- (f) Amount shown as assets in actuarial report as of April 30, 1969 less \$39,000 paid after April 30, 1969 but before June 30, 1969.
- (g) Termination benefits paid to 9 terminated Breyer, Newark employees from date of closing to June 30, 1969. No account taken of 4 employees eligible for termination benefits who had not been paid as of that date.

**Application to Modify of Defendant Kraftco  
Corporation, Dated September 17, 1973**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

—————♦—————  
[SAME TITLE]  
—————♦—————

**APPLICATION TO MODIFY OF KRAFTCO CORPORATION**

Kraftco Corporation ("Kraftco") hereby respectfully applies to the Actuary for modification, for the reasons herein indicated, of that part of his "Determination and Award" which examines the method of calculation denominated therein as "An Alternate Method".

**I**

Paragraph 2 of the Breyer Agreement provided for the payment of special termination allowances to employees "permanently terminated as a result of the discontinuance of production" at the Newark plant. The Agreement reflects the fact that distribution operations were not to be discontinued but relocated, and would continue to serve Northern New Jersey with production from the Long Island City plant.

The actuarial study contemplated by paragraph 3 of the Agreement likewise related to the discontinuance of production operations and the consequent termination of production employees.

*Application to Modify of Defendant Kraftco  
Corporation, Dated September 17, 1973*

II

The Alternate Method calculation by the Actuary may be analyzed as having involved:

1. Calculating the annual per capita actuarial cost immediately prior to the closing. The sum calculated, \$766.52, is an amount which (assuming no change in the employment level or any other relevant variable) would have to be paid, *ad infinitum*, in respect of the then active 2,022 employees in the Industry in order to fully pay anticipated benefits.
2. Calculating the same cost, on the same assumptions, but reducing the assumed perpetual employment level of 2,022 by the number of employees permanently terminated as a result of the discontinuance of production operations, this on the theory that, but for such discontinuance, the jobs of such employees would exist, and pension contributions would be made in respect of the incumbents, in perpetuity. The Actuary reduced the assumed perpetual employment level by 49 from 2,022 to 1,973 and calculated a new annual per capita actuarial cost of \$774.71.
3. Multiplying the difference between these two costs, \$8.19, by the new assumed employment level, 1,973, to yield \$16,200 (rounded) as an annual, perpetual contribution deficit allegedly traceable to the loss of the Breyer Newark production employees.
4. Calculating the present value of such annual, perpetual deficit, allegedly found to equal \$539,300, and adding to that the sum of \$37,400 found necessary to offset termination payments from the Fund made to terminated employees

*Application to Modify of Defendant Kraftco  
Corporation, Dated September 17, 1973*

who were not eligible for pensions but were eligible for such payments.

### III

The modifications applied for are as follows:

1. Of the 49 employees whose jobs were considered by the Actuary to have permanently disappeared from the Industry, 10 employees were not production employees at Breyer Newark and should not have been included. They are:

R. Duckworth	N. Kosak
J. Fisher	M. Sansone
C. Fitzgerald	S. Stompf
P. Gordon	F. Lecese
M. Park	P. Capriglione

By considering these non-production employees in a calculation limited to a study of the impact, if any, of the termination of production operations, the Actuary purported to award on a matter not submitted to him by the Breyer Agreement and the Court's order of March 24, 1971. The Alternate Method calculation should be redone with the jobs of these employees not considered as having been permanently eliminated by the discontinuance of production operations.

2. In calculating the lump sum amount necessary to offset the deficit in annual contribution income allegedly caused by the discontinuance of production operations, the Actuary used an incorrect interest rate. If a lump sum pay-

*Application to Modify of Defendant Kraftco  
Corporation, Dated September 17, 1973*

ment is to be made *now* to offset an alleged future income deficit, it should be calculated by using an interest rate that is reasonable in relation to *current* money costs, not the 3% rate used by the Actuary. At current rates, Kraftco could make its own financial arrangements to make up the alleged annual deficit at less than one-half the figure based upon the 3% rate.

Neither modification requested affects the merits of the Actuary's determination.

IV

Kraftco continues to contend as a matter of the intention of the parties to the Breyer Agreement that the Alternate Method calculation is not proper. It excepts to any inference or implication that such method was ever suggested by Kraftco as an acceptable interpretation of such intent. Rather, the method was first suggested by the Actuary on his deposition as a proper way to determine under the trust agreement creating the Fund whether or not the admission of a new employer would "adversely affect" the Fund. Kraftco argued that the Actuary's pursuit of an entirely different method in response to essentially identical language in the Breyer Agreement amply demonstrated the ambiguity of the Breyer Agreement and the necessity of a judicial determination of the parties' intent.

The Actuary, on the other hand, recognizes that "the exact meaning of [the Breyer Agreement] is in dispute" (p. 14), that "some interpretation of the meaning of the agreement must first be made" (p. 25) before any actuarial determination can be made, and that Judge Tyler did not make the necessary interpretation. Since Kraftco contends

*Application to Modify of Defendant Kraftco  
Corporation, Dated September 17, 1973*

that such interpretation is for the Court, no request for any change in this regard is made to the Actuary.

Dated: September 17, 1973

Respectfully submitted,

SULLIVAN & CROMWELL  
Attorneys for Kraftco Corporation,  
48 Wall Street,  
New York, N. Y. 10005.  
(212) HAnover 2-8100

To:

COHEN, WEISS AND SIMON,  
605 Third Avenue,  
New York, N. Y. 10016.

**Stipulation Withdrawing Application to Modify,  
Dated September 20, 1973**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246 W.K.

◆◆◆  
[SAME TITLE]  
◆◆◆

WHEREAS on September 17, 1973 defendant Kraftco Corporation applied to the Martin E. Segal Company for modification of the "Determination and Award" heretofore delivered to the Court pursuant to its Order dated March 24, 1971, and

WHEREAS by letter dated September 18, 1973 to the Martin E. Segal Company counsel for plaintiffs objected to such application, and

WHEREAS the Court has indicated that it intends to set this matter down for trial in the week of October 8, 1973,

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiffs and defendant Kraftco Corporation that such application be and the same hereby is withdrawn and that the Martin E. Segal Company shall take no action with reference thereto, and it is

FURTHER STIPULATED AND AGREED that this stipulation is without prejudice to any right that defendant Kraftco Corporation may have had in the circumstances and with-

*Stipulation Withdrawing Application to Modify,  
Dated September 20, 1973*

out concession by the plaintiffs as to the existence of any such right or the propriety of such application.

Dated: New York, N.Y.  
September 20, 1973

**SULLIVAN & CROMWELL**

s/s By **JOHN F. CANNON**  
A Member of the Firm  
  
Attorneys for defendant Kraftco  
Corporation,  
48 Wall Street,  
New York, N. Y. 10005.  
HAnover 2-8100

**COHEN, WEISS AND SIMON**

s/s By **SAMUEL J. COHEN**  
A Member of the Firm  
  
Attorneys for Plaintiffs,  
605 Third Avenue,  
New York, N. Y. 10016.  
MU 2-6077

**Pretrial Order**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246 (JEL)

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[SAME TITLE]

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Pretrial conferences having been held before the Court on September 17, 26 and October 11, 1973, pursuant to Rule 16 of the Federal Rules of Civil Procedure, and the undersigned attorneys having conferred thereafter, the following action was taken:

I. The pleadings are deemed amended to conform to this order.

II. It was stipulated, without concession that the individual trustees are necessary or proper parties to the action or that they or the pension trust have any particular rights or duties with respect to the subject matter of the action, that the title of this action shall be amended to read as follows:

\* \* \*

and that

(1) Anthony Iorio, as President of Milk Drivers and Dairy Employees Union Local 680, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, an unincorporated association, shall be substituted as a party plaintiff in lieu of Lawrence W. McGinley, as President of Milk Drivers, etc.;

*Pretrial Order*

(2) Richard Mascuch shall be substituted as plaintiff Trustee in lieu of Lawrence W. McGinley;

(3) Defendants Harvey J. Frem, Jr., Lawrence Bayard, Edward Drozd and John Reisenberg shall be substituted in lieu of Harvey J. Frem, Andrew F. Gruninger, Jr., Austin Puvogel and H. Schuyler Todd, as defendants.

III. The parties agreed that the trial of this action will be based on this order and on the pleadings as hereby amended and that the issues to be tried are as set forth in paragraph X, below.

IV. FACTS NOT IN DISPUTE

The parties stipulated the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevance to the issues).

\* \* \*

(35) In accordance with Judge Lumbard's letter to the parties, dated October 11, 1973, Kraftco makes no claim of fraud or personal misconduct in the Segal Company's appraisal proceedings in question, but Kraftco reserves its rights with respect to any claim that the Segal Company did not follow the Breyer Agreement or that it did not use a method of evaluation consistent with that Agreement or that what the Segal Company actually did do was beyond the scope of the Agreement.

\* \* \*

Dated: New York, New York  
December , 1973

*Pretrial Order*

So ORDERED:

.....  
U.S.D.J.

ENTRY OF THE FOREGOING  
ORDER IS CONSENTED TO:

COHEN, WEISS AND SIMON

By SAMUEL J. COHEN  
(A Member of the Firm)

605 Third Avenue,  
New York, New York 10016.

Attorneys for Plaintiff's

SULLIVAN & CROMWELL

By JOHN F. CANNON  
(A Member of the Firm)

48 Wall Street,  
New York, New York 10005.

Attorneys for Defendant Kraftco Corporation

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246 (JEL)

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[SAME TITLE]

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Before:

HON. J. EDWARD LUMBAR,

*Circuit Judge*

New York, N.Y.

December 5, 1973—10 a.m.

[2] APPEARANCES:

COHEN, WEISS & SIMON, Esqs.

Attorneys for Plaintiffs

By: SAMUEL J. COHEN, Esq.

STANLEY M. BERMAN, Esq., of Counsel

SULLIVAN & CROMWELL, Esqs.

Attorneys for Defendant KRAFTCO

By: JOHN CANNON, Esq.

RICHARD C. LEVIN, Esq., of Counsel

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The Clerk: Peter F. Clark, et al. against Kraftco Corporation, et al.

Plaintiff's ready?

Mr. Cohen: Plaintiffs ready, your Honor.

The Clerk: Defendants ready?

Mr. Cannon: Defendant Kraftco ready, your Honor.

The Clerk: Both sides ready.

*Colloquy*

Mr. Cohen: I shall be ready to proceed presently, if your Honor is.

The Court: Please do.

Mr. Cohen: In view of the fact that we have filed a trial memorandum a little bit longer than I usually like to file, and our friends, the defendants, also filed a substantial trial memorandum, I do not think that it would help matters to begin opening statements. I do not believe it is required, your Honor, and if that is satisfactory, I [3] will just proceed with our evidence.

The Court: I leave that entirely to you. Of course, the facts here are somewhat complex, as well as some of the issues, and therefore you had better not assume at any point that I am aware of all the nuances with which you are acquainted.

Mr. Cohen: We will try not to forget detail that should be emphasized, your Honor.

I must say, though, that we believe so far as the plaintiffs' direct case is concerned, it can be presented by documentary evidence, and I have that documentary evidence classified and listed; that with your Honor's permission I would hand up for convenience a list, which I will also hand to counsel at the same time, merely listing the various documents that we will now offer in evidence (handing.)

\* \* \*

[4] Mr. Cannon: With the Court's permission, I am Mr. Cannon. I would like to make an opening statement, and I wonder whether that should be done before or after the receipt of the documents in the plaintiffs' case.

The Court: Do you have any testimony that you are going to adduce, Mr. Cohen?

*Colloquy*

Mr. Cohen: We think not, your Honor, on our direct case. We think that the only testimony we will present will be in possible rebuttal.

[5] Mr. Cannon: In that event, your Honor, I suggest, in fairness to Mr. Cohen, that I ought to make my opening statement before he rests.

The Court: I should not think it would really make much difference if the plaintiffs' case is entirely documentary.

Mr. Cannon: Your Honor, the point is that I want to make clear that there are burdens of proof here on Mr. Cohen, as we view the case, which may not be met by mere documentary evidence, and I think that would appear from my opening statement.

The Court: In other words, you wish to alert the Court as to the points you might make in a motion to dismiss at the end of the plaintiffs' case?

Mr. Cannon: Yes, your Honor.

The Court: Well, that might well be helpful, and in light of that, do you care to say anything first, Mr. Cohen? I am not suggesting that you need to.

Mr. Cohen: No, I think that I will just hope to save my time for what might arise at the completion of the plaintiffs' case and not burden your Honor twice. I, of course, have no objection whatever to Mr. Cannon making his statement whenever he wishes to.

\* \* \*

[6] Mr. Cannon: Your Honor, this is an action on a contract.

The plaintiffs' purpose here and its burden is to establish that Kraftco entered into an enforceable contract obligation which it refuses to perform.

In a prior decision in this case by another judge of this court, it has been held:

*Colloquy*

(1) That plaintiffs' basic argument as to the construction of this agreement is incorrect. Judge Tyler held that the parties did not intend to confer upon Martin E. Segal & Co., the actuaries in this case, the authority to resolve ambiguity in contractual language....

Judge Tyler held, and we submit obviously correctly, that the actuary's function under this agreement was limited to the traditional scope and expertise of an actuary, and that only as to those matters was its decision to be final and binding.

\* \* \*

The actuary's report, most importantly, now confirms Judge Tyler on the point that actuarial science does not yield a definite interpretation of this document. I will discuss the report and the findings of the actuary in a moment.

The important threshold point here is that plaintiffs stand faced with law of the case, which quite clearly says that the contract provision on which they rely is ambiguous and must be interpreted on the basis of competent evidence of the parties' intent.

If the unions do no more than stamp their feet and urge a reversal by this Court of Judge Tyler, we submit the law permits only one result: the dismissal of their complaint for failure to prove an enforceable contract obligation.

\* \* \*

*Colloquy*

[19] Under these circumstances we feel that the plaintiff should not blast through Judge Tyler, and if he does not offer evidence supporting a definite construction of this agreement, his complaint should be dismissed.

That is our opening statement.

Thank you.

Mr. Cohen: If I may say but a few words at this time, your Honor? I still do not believe that an extensive opening statement is required at this stage.

\* \* \*

[23] In any event, we say to your Honor insofar as our direct case is concerned, that if Kraftco wishes to establish that there is some ambiguity which is not apparent on the surface of the agreement, then it will be for them in their defense to carry the burden of proving it to the Court, that although the agreement on its face appears to be extremely broad and emphatically clear, that they have some evidence which would destroy that, but we [24] do not think that the agreement on its face discloses any ambiguity.

\* \* \*

[25] Mr. Cohen: Your Honor, we would like to submit next, as the plaintiffs' exhibit, \* \* \* [48] [Exhibits introduced]

Under all of the circumstances, the agreement which we believe is broad, not ambiguous, the original finding, the second finding following Judge Tyler's order, we think, your Honor, that we make out a complete plaintiffs' case here, and at that point, your Honor, plaintiffs rest.

Mr. Cannon: If your Honor please, I would like [49] at this time to renew Kraftco's motion to dismiss the complaint \* \* \*.

*Colloquy*

[56] As I said in the opening statement, we believe that the contract is susceptible of a definite interpretation, but we believe that reference to the contemporaneous evidence of the parties' intent is necessary to come up with that determination. The plaintiffs have declined to offer any evidence of that intent. They have been warned, they have not made a *prima facie* case, and it should be dismissed.

Thank you.

The Court: The Court will reserve decision and listen to the defendants' case.

Mr. Cannon: May I have one moment, your Honor?

The Court: Certainly.

Mr. Cannon: Your Honor, we would like first to offer some documents in evidence.

Mr. Cohen has anticipated us to some extent, and it may take a moment to sort that out.

Your Honor, first of all, we would like to [57] offer in evidence the proposals made by the union in the course of the 1968 Industry-Wide negotiations.

Mr. Cohen: If your Honor please, we are inclined to object to all preliminary proposals, negotiations on the usual ground that they were merged into the agreement finally arrived at. Of course we are trying this case before your Honor and not with a jury, and I would anticipate that your Honor would probably want to look at everything that possibly might bear on the case, and I would not want to interfere with that. So perhaps for the convenience of the Court, and merely for the record, if the record would show our general objection to all of that kind of material, and if your Honor would accept that kind of a general

*James J. Leyden—for Defendant—Direct*

objection I will not rise and take up the time of the Court to make various objections from time to time. Perhaps in that way we can proceed with the trial more expeditiously, and your Honor will then decide what weight, if any, to give to these various items.

The Court: Yes.

Mr. Cohen: Thank you very much.

The Court: Yes, I will receive that.

\* \* \*

[66] JAMES J. LEYDEN, called as a witness by the defendant Kraftco, having first been duly sworn, was examined and testified as follows:

*Direct Examination By Mr. Cannon:*

Q. Mr. Leyden, what is your profession? A. Attorney.

Q. Are you a member of the Bar of what state? A. Pennsylvania.

Q. Do you have a present professional association? A. Yes, I am a partner in the Philadelphia law firm of Schnader, Harrison, Segal and Lewis.

Q. How long have you been a partner of that firm? A. I came with the firm on the 1st of August following Pearl Harbor, and made a partner in about seven years—maybe eight years, I am not sure.

Q. And your pre-legal education and legal education were where? A. At the University of Pennsylvania, at the Wharton School until my father died, the end of my first year, and then thereafter in Pennsylvania. You could, and I did take some academic examinations so that I could attend Temple University Law School at night, from which I [67] was graduated, I guess it was 1934.

*James J. Leyden—for Defendant—Direct*

Q. And between graduation and joining the Schnader Harrison firm, what was your work experience? A. For a part of the time I continued to work in the bonding claim department of the Maryland Casualty Company, and for the balance of the time I worked as an attorney in the employ of Liberty Mutual Insurance Company, first in Philadelphia and then for about two years, in Pittsburgh.

Q. Mr. Leyden, during your career at Schnader Harrison have you had any major concentrations so far as the practice of law goes? A. Yes. For a number of years I spent more time in the courtroom trying cases than I did in labor law, but throughout the years I was trying I was engaged in the labor field. And for the past ten or eleven years my time has primarily been in the labor relations field—some litigation in connection with labor matters.

I guess that's it as far as a lawyer is concerned.

Q. As a lawyer, Mr. Leyden, have you represented pension funds at any time? A. Yes.

Q. Any fund or funds? [68] A. There is a fund in Philadelphia known as The Teamsters Pension Trust Fund of Philadelphia and Vicinity, of which I am co-counsel. It was formed in 1957, and I have been co-counsel from then to date.

I have had contacts with other funds, but that is the one fund of which I am co-counsel.

Q. The Teamsters' fund, is it a Philadelphia Teamsters' fund? It is a joint industry fund? A. It is a multi-employer-Taft-Hartley-Section 302-Pension Trust Fund.

It has approximately 25,000 plus persons on whose behalf contributions are made by roughly 2,000 employers.

Q. In the course of your work in that area do you receive and read actuarial reports? A. Yes.

*James J. Leyden—for Defendant—Direct*

[71] *By Mr. Cannon:*

Q. Mr. Leyden, let me briefly go into some of the background here. You participated in the negotiations of April 25, did you not? A. Yes.

Q. Could you briefly sketch the background to those negotiations as you understand them? A. May I say this, your Honor, and Mr. Cohen, I appreciate your gratuitous statement this morning that my firm has been general counsel for Sealtest for many years—the fact is we have not been but we have been over those years counsel whom they have consulted when labor relations matters came up. It is again that—I have to give you that background to explain to you, as I understand it, about the ice cream negotiations that were being conducted here in New York, as they had been historically with Mr. Cohen acting as the chief attorney or chief negotiator [72] for the two unions, Mr. McGinley's union from the Jersey side of the river, and Mr. Clark's union on this side of the river.

They had started some time before April 25. I was told that there seemed to be a reluctance to discuss at those negotiations Breyer's problems in connection with its intended closing of the Newark plant.

Since there were joint negotiations there, there came a point in time when Breyer sent a notice to the negotiators that as far as the Newark part of the negotiations were concerned they were withdrawing as a member of the Newark group, and shortly thereafter the unfair labor practice charge was filed in Newark, maintaining, by Breyer, that the unions or the union was unlawfully refusing to negotiate the Breyer individual problem.

Whether it was as a result of that or whether it was pure happenstance, the fact is that a day or so later ar-

*James J. Leyden—for Defendant—Direct*

rangements were made to have the meeting here in New York to discuss that problem, and my partner, Irving Segal, who had been consulting with Sealtest all along up until then, assigned me to come up here to attend the meeting—I believe my selection stemmed out of the fact that a couple of years earlier I had been the industry negotiator in Northern New Jersey for the milk industry, [73] and that emerging from that experience on my part, and I hope shared by Mr. McGinley, was a sense of mutual respect for McGinley as a sound labor leader, and I think he felt the same way about me as a representative of employers.

It was against that background that I came to New York.

\* \* \*

[74]

## AFTERNOON SESSION

Q. I believe, Mr. Leyden, you had just testified briefly to the circumstances that caused you to come to New York.

As far as your firm is concerned, who is your senior member in connection with the rendering of labor advice to Kraftco? Who is the man most responsible for that? A. At that time it was Mr. Irving Segal.

Q. Let me show you what has been marked as Defendants' Exhibit J and received in evidence, namely, the [75] so-called Swift Agreement, April 21, 1966.

Did your firm render advice to Swift & Company at that time? A. Yes. In fact, it was Mr. Irving Segal who handled that matter primarily.

Q. He was, again the man in your office in charge of that aspect of your representation of Swift? A. Yes, he was. So that you will understand, Mr. Cannon, we have a committee system in the office—a labor committee, of which

*James J. Leyden—for Defendant—Direct*

there were a number of members, and at that time Mr. Segal was the chairman. So I had not a pinpoint knowledge but a working knowledge of who was doing what.

Q. Mr. Leyden, did you come from Philadelphia on the 25th, or the day before? A. No, I came on that morning.

Q. And about what time did you arrive? A. I took the 8:00 o'clock express out of the 30th Street station, and whatever time it got here I got here. I can't remember exactly what time it was—it was usually a quarter to ten in those days, as I recall—about an hour and three quarters.

Q. And where did you go? A. I believe I went to the suite which the Breyer [76] people had in the hotel at 43rd and the river, where negotiations had been going on.

Q. By the "negotiations," you mean the industry negotiations? A. I do.

Q. And the hotel I believe is stipulated to be the Sheraton, if you do not recall? A. It is right across the street from United Parcel.

Q. Who was present on behalf of Kraftco when you arrived? A. To my recollection David Campbell, Donald Mott, Mr. Vaughn Ashenbrenner. I have a feeling that someone else—oh, Mr. Glynn was there, and I have a feeling that there may have been someone else but I just can't recall.

Q. Approximately how long was it before you sat down with representatives of the union? A. my best recollection—and I think I should state that my best recollection has been refreshed by referring to Mr. Cohen's notes which are in evidence, your Honor, and to Mr. Mott's notes which have been offered in evidence. I saw them before today.

And to answer your question, sir, I would say [77] about an hour and a half or an hour and three quarters after I

7

*James J. Leyden—for Defendant—Direct*

arrived to meet with the Breyer people, sometime shortly before noontime a joint meeting was held at which I was present for Breyer; Mr. Mott and Mr. Glynn were present for Breyer; Mr. Cohen, Mr. McGinley and Mr. Clark for the unions; and Mr. Aaron Solomon, who was the industry-wide representative also sat in at that meeting.

Q. Again for the company, yourself and Mr. Mott— A. And Mr. Glynn.

Q. Mr. Leyden, I would like to hand you the documents previously marked and received as Exhibit D, being Mr. Cohen's notes, Exhibit G; Exhibit H, being your notes, and Plaintiffs' Exhibit 10, also being your notes, and Exhibit I, Mr. Mott's notes; and since you recently used them to refresh your recollection, why don't you try to use them and just tell the Court what happened from the time you started the meeting with the union at 11:45 for the balance of the day. A. May I use my copies that you gave me, or are you going to hand me—

Q. We can hand you the original exhibits (handing).

Mr. Cohen: If your Honor please, when I made my general objection, am just reminded that we were talking about the documentary evidence. I just want to beg your [78] Honor's indulgence, that the same objection may continue as to matters preceding the agreement which I would ordinarily claim would be merged into it, and I will not rise to object from time to time.

The Court: Yes.

Mr. Cannon: The witness now has before him Exhibits D, G, H and I, and Exhibit 10 has yet to be put before him.

I have an extra copy of that, in your actual handwriting. Perhaps we can use that (handing).

*James J. Leyden—for Defendant—Direct*

Mr. Cohen, do you agree that that is the original of number 10 which is being given to the witness?

Mr. Cohen: If you say so, I certainly will agree.

Mr. Cannon: Thank you.

*By Mr. Cannon:*

Q. I believe you said, Mr. Leyden, that Mr. Cohen's notes, Exhibit D, page 2, indicates a meeting at 11:45.

Will you tell the Court what happened at the 11:45 meeting? A. After the amenities of the situation, the first—and I have a clear recollection of this, independent of these papers—was Mr. Cohen's assurance that the fact that the [79] meeting was being held to discuss the Breyer-Newark plant problem, the fact that the meeting was being held had no connection or relationship with the unfair labor practice charges which had been filed a couple of days before.

Thereafter—and I am not sure whether it was Mr. Cohen who did most of the talking but I am inclined to think that Mr. McGinley did—I was told what the points were on which the union was saying agreement had to be reached.

There were five of them, as I noted it down for my own purposes, and as Mr. Cohen has in his notes, and there is no disagreement between us as to what they were.

The first had to do with the request—Mr. Cohen's notes as to requested assurance that no other employer in the industry would discontinue its plant operation or any operation during the term of the new agreement—

Q. The new agreement would again be the industry agreement? A. Yes. Secondly, there would have to be an agreement reached between the parties as to what would be done pension-wise in light of the closing of the plant.

*James J. Leyden—for Defendant—Direct*

The third item was a request for severance pay.

The fourth item had to do with what was going [80] to happen after the plant was discontinued, and the desire of course, of Mr. McGinley being to keep as much of the operation as he could—he would like to keep it up. In fact, he said, as I recall it, that he wanted us to stay in operation in Newark for another year.

And the fifth item was, what rights would the displaced employees have, so far as going to work for the company at its ice cream plant on Long Island.

Those were the five items.

Repeating, as I recall—it was not a long meeting—the notes of Mr. Cohen and Mr. Mott indicate, and my recollection is about the same, that we broke that off at 12:30.

Q. So the first session with the union was from 11:45 to 12:30, approximately? A. Yes, sir.

Q. Let me refer to Defendants' Exhibit I, which are Mr. Mott's notes. He indicated the presence of the parties that you have indicated, and then after that, in parentheses, he has, "Larry agreed that Parsonnet told him everything Buddy told Tom." A. I can tell you—I know I am sure what that means—I know exactly what it means. What Larry was explaining to the group was he was aware that at an earlier [81] date Irving Segal, who is known as Buddy Segal, had met with Larry's long-time attorney, Tom Parsonnet, and Larry was assuring that Parsonnet had told him, Larry McGinley, everything that Buddy Segal had talked to Tom Parsonnet about.

Q. The meeting ended at 12:30. When did you resume again with the union? A. Late in the afternoon, at about a quarter to five—the reason being, among others, Mr. Cohen had to be at a certain meeting at United Parcel across the street, where, as I understand it, he did then and still does represent the Teamsters' local that represents the United Parcel employees, so that he had to be gone for at least two to four for that meeting: and there was lunch to be had, and we got back together about a quarter to five.

*James J. Leyden—for Defendant—Direct*

Q. Let me refer you to Defendants' Exhibit G, Mr. Leyden. When did you prepare that document (handing)?  
A. Exhibit G was written by me while in the caucus consulting with the representatives as to what, when we reconvened with the union representatives, our offer or our position would be on the five items that I had mentioned to you.

Q. So Exhibit G was then prepared sometime between 12:30 and 4:45 when, according to Mr. Cohen's notes, the [82] parties resumed discussions; is that correct? A. That is correct.

Q. Is it your recollection, Mr. Leyden, approximately how much time was—

Well, let me withdraw that for the moment.

The second meeting with the union—let me back up a little bit.

There is a reference in Defendants' Exhibit I, which is Mr. Mott's memorandum, to union proposals numbers 34 and 35, and there is a reference in your memorandum, Exhibit G, to number 34 and number 35.

What were they? A. Number 34 of the union's agenda—I am paraphrasing what I think was the thought behind it—

Q. Well, rather than the thought behind it, perhaps I can show you this document, Exhibit A, and ask you if the number 34 and number 35 are referred to or are in that document (handing)?

(Witness examines.)

Mr. Cohen: Does the record show what document the witness is looking at?

Mr. Cannon: Exhibit A.

Mr. Cohen: Thank you.

Mr. Cannon: I have given him the original. [83]

A. I am operating at two levels at the moment.

*James J. Leyden—for Defendant—Direct*

The Court: What is the question?

(Question read.)

A. In what has been marked as Exhibit A, on page 7—that is the last page of the exhibit handed to me—there is an item at the top of the page, numbered 34, and it says as follows:

"Pages 51-52 Exhibit D; amend by adding"—and then there is this long suggested add. If you want me to read it I shall.

"An Employer who, by reason of termination of all or part of its business, or of sale, lease, or for any other reason terminates the employment of employees in sufficient number to affect the pension fund actuarially shall be obligated to defray the cost of an actuarial study to determine the effect of such termination and to make such payment or payments to the fund as may be found actuarially required to offset any such effect. In all such cases (except by layoffs or discharges in the ordinary course of business) the employer shall continue paying the required contributions to the welfare fund until the expiration date of this agreement, and shall continue contributions to the pension fund for employees who would, but for such termination, become entitled to a form of pension [84] benefit prior to the said expiration date, for the same period; provided, however, that such continued contributions shall terminate with respect to any former employee who within that period of time secures employment subject to the provisions of this agreement."

And number 35 refers also to "pages 51-52, Exhibit D, increased rate of severance pay to one week of pay for each year of service to be paid"—payable in a lump sum rather than in installments.

*James J. Leyden—for Defendant—Direct*

In other words, the existing contract had a severance pay clause in it, and this request was to increase the amount of severance pay to one week of pay for each year of service.

Mr. Cannon: The references, your Honor, at page 7 of Exhibit A, which is the union's proposal, are the references to Exhibit D in number 34 and number 35, to Exhibit D, to the collective bargaining agreement that was expiring at that time, and in particular to Exhibit D, the agreements marked as Plaintiffs' Exhibits 3 and 4.

In particular, with regard to the Local 680 contract—well, I will pass that up for the moment.

Q. Mr. Leyden, returning to the notes, Mr. Mott's reference in Exhibit I and your references in Exhibit G to number 34 and number 35, are references to those proposals [85] in Exhibit A? A. Yes.

Q. Now will you tell the Court what happened at 4:45 when the parties met? A. When we got back together at 4:45, I had, as I think I testified a few minutes ago, written down what my clients had concluded would be their position, and when we got back together I presented to Mr. Cohen and Mr. McGinley and Mr. Clark the five positions of the company.

On number one I stated that Breyer would go along with whatever was agreed to by the industry.

On number two, I proposed in the alternative one of the following approaches: that Sealtest would agree to have an independent actuarial study as to whether the change in the operation in Newark would adversely affect the pension fund, and if it came out that it does affect it, to negotiate a solution, or, in the alternative, that the company would accept whatever Local 680, the Teamsters Local 680, negotiates with the other ice cream employers on item number 34.

*James J. Leyden—for Defendant—Direct*

As to the third item, again it was in the alternative—we said that Sealtest would agree to pay one week of severance pay for employees with 15 or more years [86] of accumulated service, or, in the alternative, whatever Local 680 would negotiate with the other employees on item number 35.

On the fourth item we said that notwithstanding any provisions in the labor agreement—and I think parenthetically, your Honor, I ought to mention this to you, although it is pregnant with meaning to all of the others—the contracts historically had a clause in them, the general import of which was to say that once a new contract started and you had a plant in being, you were to keep it in being for the life of the contract.

So that on our fourth item we said, notwithstanding the fact that that might continue in the new contract, we wanted the understanding that on and after November 2, 1968—remember, Mr. McGinley said he wanted it to stay open for a year—that Sealtest would have the right to discontinue its manufacturing of ice cream at the Newark location but had the ice cream made by the other union over at the Long Island plant, brought over to a new box location in New Jersey, and from there the ice cream would be continued to be distributed by Mr. McGinley's 680 men.

The fifth point was our position that any Newark employee who, when the plant closed, wanted to, [87] would have a right to go to the foot of the Long Island plant permanent seniority list, which would mean that if there was an opening or somebody died or quit, that the people competent to handle the work in the order of seniority would go to work in that plant.

That is what happened when we first got back.

I am sure there was some more talk, and then—I think during that talk was at the time when Mr. McGinley pointed out to me the note that I made or which you had marked as

*James J. Leyden—for Defendant—Direct*

Exhibit H—in particular Mr. McGinley was arguing, as it turned out persuasively, that—

Q. Excuse me. I am getting lost at the time. This started at 4:45, and you stated that what happened—now this is continuing with the discussion at the time? A. Yes. One of the positions taken, suggestions by Mr. McGinley, was, why have the 15 years in as a severance pay requirement. After all, my note says that Larry says we are only asking about 100 extra weeks and he gives me a breakdown in each classification which I noted down at that time of how many employees were in various classifications with less than 15 years.

Q. Mr. Leyden, let me ask you something about this—and it may be it is my confusion on these notes.

Mr. Cohen's notes indicate that the statement [88] of position by you at 4:45 was followed by a union caucus, and then the presentation to the company at 6:30 about the results of the union caucus. A. I am not up to the caucus yet—I could be wrong in suggesting that Mr. McGinley made this statement that I have referred to from Exhibit H during our first session when we got together at 12:45—I could be wrong about that. I am inclined to think it was, because then there was a caucus—I forget how long it lasted. Then we got back together again, and this time, as I recall it, with Mr. Cohen acting as the spokesman, he went through the five items stating what the union's flat-out position was.

Q. Excuse me, why don't you finish what your recollection is with regard to the pre-caucus meeting? A. Which caucus are you talking about?

Q. Well, you were talking about the meeting that began at 4:45 and you had not exhausted your recollection. A. Well, at the 4:45 meeting I stated, out of my mouth, the things I had written down for myself on Exhibit G.

*James J. Leyden—for Defendant—Direct*

My best recollection is that there was then some discussion about those items, in the course of which Mr. McGinley—I made this note about the severance pay—

Q. That is Exhibit H? [89] A. That is Exhibit H—and then a caucus, so that the union could then, by itself, go over the various items.

How long that caucus lasted, I am not sure.

Q. Okay. A. In any event, after the caucus was over, we—myself, Mr. Mott, Mr. Glynn, rejoined the union negotiators, and at that time Mr. Cohen went through the five points stating the flat-out position of the union.

After receiving that I recessed and went back to my clients—

Q. Well, let me go back to this Exhibit H note again, Mr. Leyden. Could you tell me what it signifies? What does the writing indicate? A. Well, at the top I have got the words down “oral commitment.”

On number two, I did not write anything down. After all, Mott was my notetaker, but I did note down in my own handwriting on number three this business about why Larry McGinley argued that we ought to hold the 15 year requirement.

Q. Why you should? A. He said we should not hold to it, we should forget it, no matter what length of service, if it was a [90] year or more, a week.

Q. Okay. The exhibit lists “traffic-12.” Where did that information come from, and what kind of information is it? A. You have got me lost.

Q. Exhibit H. A. Oh, I am sorry. I made this notation, and this is the source of what Larry McGinley was saying.

I made the notation:

“Less than 15 years,” in “traffic-12” people.

In “cabinet”—none.

“Garage”—none.

“Production”—six.

“Maintenance”—none.

*James J. Leyden—for Defendant—Direct*

(After examining). It looks like "women"—none. And "office"—I can't tell whether it is a "3 or 13."

Q. Then the note down at the bottom. A. "Larry—asking about 100 extra weeks."

Q. So this reflects information given to you by Mr. Cohen, to the effect that if the 15 year requirement was dropped it would only cost 100 weeks' pay? A. Additional.

[91] Q. Where is the 15 year requirement? Where is it, do you recall? A. I do not know whether it was in the then existing—I think it was in the then existing contract.

Q. Now Mr. Cohen, you indicated, came back with the unions' response on the items.

What did he say with respect to each, as best you can recall A. What he said is what I attempted, after my clients approved it, to write up in longhand in—I don't know what number it is—

Q. Plaintiffs' Exhibit 10? A. Whatever exhibit number it is—it is the second one in the longhand exhibits of mine—

Mr. Cannon: The record should reflect that it is Exhibit 10.

A. Exhibit 10—I tried to put into language what Mr. Cohen had said was necessary, as I say, after my client approved it—and I might add, as Mr. Cohen's notes show, it didn't take too long.

Q. Let us see if we cannot refine the time as to the meeting at which you delivered the contents of Exhibit G. It began at 4:45. How long would you say that lasted, Mr. Leyden? [92] A. Let me put it to you this way: whatever started at 4:45, plus the caucuses, and Mr. Cohen's going over the five items, saying this is what they had to have, that consumed until 6:30, approximately.

May I see Mr. Mott's notes, please?

(Handed to witness.)

*James J. Leyden—for Defendant—Direct*

The Witness: (After examining) Yes. I went back to my people, as I say, after we talked about it and I put in writing, this Exhibit 10, what Cohen wanted, what I understood my client was willing to agree to.

Now if you want me to I will tell you that both notes indicate—it conforms with my recollection that within three quarters of an hour I was back in and this time handed what has now been marked as Exhibit 10 to Mr. Cohen.

He went over it and he agreed that it conformed to the principles which had been discussed between us.

Q. The note of Mr. Cohen's notes, Exhibit D, "Leyden presents written summary of agreement with above. SJC"—that would be Mr. Cohen—"says this is acceptable statement of principles agreed on. If more precise language is needed we will work it out. All agree that Leyden's handwritten statements will be xeroxed and distributed by Solomon tomorrow."

Does that note accord with your recollection? [93] A. Maybe I ought to add this, because it happened—I signed it and Aaron Solomon signed it, and then I gave it to Mr. Cohen for his, Larry's signature, and he wouldn't sign it.

Q. Did he state any reason? A. Not that I can remember.

Mr. Cannon: Your Honor, the record will reflect that in Defendants' Exhibit F, a notation in the April 26, 1968 minutes, a reflection of the union by Mr. Cohen reviewing the status of its proposals with regard to number 34—a notation appears, "Withdrawn except as to Breyer's"—reflecting that on

*James J. Leyden—for Defendant—Direct*

April 26, proposal number 34 in the industry negotiations was withdrawn except as to Breyer's.

There are references in the minutes, also marked for April 9th and April 17th; also with reference to union proposal number 34. The indications are that Mr. Mott was present at these meetings.

Mr. Mott is no longer an employee of the company.

May I have a moment?

*By Mr. Cannon:*

Q. I believe the record already indicates that the document that became the Breyer Agreement, so-called, which is Exhibit 15, Plaintiffs' Exhibit 15, was actually prepared [94] in the offices of Solomon & Rosenbaum; is that correct? A. Which one, Mr. Cannon?

Q. The Breyer Agreement, Exhibit 15. A. Is that the typewritten agreement—

Q. That is right. A. —that was ultimately signed by the union and the company?

Q. Yes. A. That was prepared in Mr. Aaron Solomon's office.

Q. Right. And do you recall personally whether you received any phone call or anything from Mr. Solomon about it? A. I did not participate in the drafting of that final agreement. Mr. Solomon, however, mailed me a copy and sought my approval which he received before he sent it along to Mr. Cohen.

Q. Is there anybody else in your office who reviewed the Breyer Agreement? A. I believe Mr. Irving Segal did.

Q. I show you this document and ask you what that indicates (handing)? A. (After examining) Yes, this is—has Mr. Cohen seen this?

*James J. Leyden—for Defendant—Direct*

[95] (Mr. Cannon hands to Mr. Cohen, who examines.)

Mr. Cohen: Thank you.

A. This is a picture of a transmittal slip in longhand from Mr. Irving Segal to me, dated May 11, 1968, and under the heading of "remarks" appear in longhand "Breyer Agreement looks ok. Wish we didn't have address in Long Island, but guess that's best you could do."

\* \* \*

[97] Q. Mr. Leyden, I will ask you just a few more questions.

In all of the discussions on April 25, 1968 was there any mention of people previously retired under this pension program? A. No.

Q. Was there any discussion of the state of the unfunded liability of this pension fund? A. No.

The Court: Were people previously retired?

Mr. Cannon: Yes.

Q. Was there any discussion about any assumption of perpetual stable employment in the industry? A. No.

Q. Was there any suggestion made by anybody at any time that this closing of the Breyer plant worked a radical change in the economics of the industry or anything to that effect? A. No one so stated.

Mr. Cannon: I have no more questions, your [98] Honor.

Mr. Cohen: I have a few questions, if Mr. Cannon is through.

*James J. Leyden—for Defendant—Cross*

*Cross-Examination by Mr. Cohen:*

Q. Mr. Leyden, just responding now to the last things that Mr. Cannon asked you, whether anybody said there was going to be a radical change in the pension fund due to the plant's closing, whether there was anything said about an assumption of permanent stable employment in the industry, so far as the pension plan was concerned, whether there was anything said about the unfunded liability of the pension plan, whether there was anything said about the people, the employees who had previously retired—I'm trying to paraphrase all the things as I recall and as I noted Mr. Cannon last asked you—do I understand your testimony correctly to be that there was just no discussion of these items on April 25th? A. In my presence there was not.

Q. Thank you. Now without going back into my notes, there was something you testified in regard to an agreement with another company at another time—the Swift Company, I believe, in 1966. Do you recall that? Do you recall your earlier testimony, is what I am asking you now? [99] A. I said I believe that Mr. Irving Segal had been very actively engaged in that matter.

Q. Yes, and did he or you draft the agreement which ultimately was entered into between the unions and Swift & Company? A. I did not draft it. I don't think Mr. Segal did, but it is better that you ask him.

Q. Do you know whether somebody in your office was the draftsman of that agreement? A. I do not know.

Q. Have you seen that agreement? A. Yes.

Q. Do you know whether that agreement called for any actuarial study to be made? A. The agreement that I have been referring to is the agreement which was entered into

*James J. Leyden—for Defendant—Cross*

between the same two local unions and Swift & Company, and covering in numbered paragraphs how contributions should be made to the pension and welfare fund, in light of the closing of the Swift Brooklyn ice cream plant, which had involved some 60 odd employees.

Q. That is a correct identification of the agreement, Mr. Leyden.

Now having that agreement in mind, and if you [100] would like to examine it, I will be happy to have a copy passed up to you. A. If you say there is nothing in there, I won't contradict you about an actuarial study—I don't remember anything about it.

Q. Well, I am asking your help. So that there will be no mystery about it, I do so state. This is a copy to which I have just added the word "Swift." I believe it is Defendants' Exhibit J—

Mr. Cohen: Well, maybe I should show it to you,  
Mr. Cannon.

Mr. Cannon: No, it is okay.

Q. You can use your copy or look at this, as you may prefer.

(The witness examines.)

Mr. Cohen: It is, we believe, your Honor, Defendants' Exhibit J, and for convenience if I may hand up my copy so that the witness may examine it (handing).

Q. Again, Mr. Leyden, in answer to your query so that there will be no mystery about it, I do assert, and I'm asking you whether you agree or not, that there is no reference in that agreement to any actuarial study.

*James J. Leyden—for Defendant—Cross*

(The witness examines.)

Mr. Cannon: If you want the witness to answer [101] that without reading it, I will stipulate that it does not say anything in there about actuarial study.

Mr. Cohen: Thank you.

The Court: That is Exhibit J?

Mr. Cohen: Defendants' J, I believe, your Honor.

A. It does not, if I may say—it does not say anything about an actuarial study, but in paragraph numbered 1, the following appears:

"With respect to the 13 former Brooklyn employees who retired on pension following the termination of operations at Brooklyn, the Company shall pay to the Ice Cream Industry Drivers and Ice Cream Employees Union Pension Trust Fund (hereinafter referred to as 'Pension Fund') a sum of \$8,015.05, which reflects the amount computed by the Unions as necessary to equal three years contributions for said employees to the Pension Fund."

I think I have been around long enough, Mr. Cohen, to know that normally that computation—that somebody assisted the unions in making it, whether it was Segal or somebody else I don't know.

Q. That agreement, Mr. Leyden, recites, does it not, that the union made the computation, that the company accepted it as final— [102] A. "which reflects the amount computed by the Unions as necessary."

Q. Yes, we are not quarreling. But the agreement but does not as such call for an actuarial study to be made, does it? A. It does not say it in so many words.

Q. Thank you. A. No, it does not.

*James J. Leyden—for Defendant—Cross*

Q. It does not leave anything open to be computed by anyone thereafter, does it? A. No, it says that the computations have already been made.

Q. Yes, and that agreement also states, does it not, Mr. Leyden—and by all means refresh your recollection—that all of the employees whose work was temporarily terminated by the closing of the Swift plant in Brooklyn—all of them would be offered re-employment. A. If you can tell me which paragraph it is.

Q. Certainly. I do not have my copy in front of me—in the middle of the second page. A. (After examining). Yes. It says this:

“Each of the 51 employees separated as a result of the termination of operations of the Brooklyn plant, including the eight persons now employed at [103] Woodbridge, shall be offered employment under the terms of the collective bargaining agreement at Woodbridge”—that means in my parlance, in labor relations, they go to the foot of the list and get jobs when jobs open up.

Q. Mr. Leyden, I think we should be in agreement with what is in the paper and what is not. I am not in any sense attacking your recollection or characterization of it, but if you will look further in that agreement you will also find—I am sure you will conscientiously want to correct your statement that they were in fact guaranteed employment for one year as a minimum, and that this does not mean that there would be any work for them under this agreement. It means that they were all offered re-employment.

Mr. Cannon: Excuse me, your Honor, I think we are arguing about what a document says, and Mr. Leyden is not the author of the document. The document speaks for itself.

*James J. Leyden—for Defendant—Cross*

Where are you reading from, Mr. Cohen?

Mr. Cohen: I am not reading from anything. Mr. Leyden has the agreement there, but I believe you will find what I have said on page 2 of the exhibit.

Mr. Cannon: On page 2?

Mr. Cohen: I think so.

[104] Mr. Cannon: Will you give me a minute, please?

(Mr. Cannon examines.)

Mr. Cohen: I don't mean to hold back. I do not have my copy at the moment—

The Witness: Here it is (indicating).

Mr. Cohen: Well, I don't want to take it from Mr. Leyden, unless he is finished with it.

I will be glad to point out the places—maybe that would be most helpful.

My reference is to paragraph number 8 on page 2 which says:

"Each of the 51 employees who is accepted for employment at Woodbridge shall be employed as a regular employee and shall be afforded an opportunity to work as provided in paragraph 5 of the current agreement between the Company and Local 680 and shall be guaranteed such employment until January 14, 1967."

This agreement is dated April 21, 1966.

I have also made reference to paragraph number 5 on the same page which reads:

"Each of the 51 employees separated as a result of the termination of operations of the Brooklyn plant, including the eight persons now employed at

*James J. Leyden—for Defendant—Cross*

Woodbridge, shall be offered employment under the terms of the collective [105] bargaining agreement at Woodbridge. Such offer shall be mailed on or about April 28, 1966 to the last known place of residence of said employees as shown on Company records and shall require that if the employee desires to accept the offer, he shall make application for employment to the Manager or Superintendent of Woodbridge on or before May 28, 1966."

And I would like to emphasize the next sentence: "Each such applicant shall be employed at Woodbridge not later than seven (7) working days after his application is received, provided the applicant is able to perform work normally performed at Woodbridge. Copies of the offer of employment to each such employee shall be mailed to Local 757 at its regular place of business, simultaneously with the mailing of the offer to the employee."

I hope that the reading of that is helpful.

*By Mr. Cohen:*

Q. Another question, Mr. Leyden, in the Swift case, the Swift Brooklyn plant, which had been closed, was closed a year or more before this agreement from which I have just read was entered into, was it not? A. Before, how long I don't know.

Q. Well, approximately a year or more? Possibly up to two years? [106] A. I would prefer that those who know when it closed answer the question, because I do not. I did not handle the matter.

Q. Let me not press you, then.

What I am leading to is simply this, that this agreement was consummated not in advance as the Latin expression quid pro quo for the closing of a plant but after the event,

*Irving R. Segal—for Defendant—Direct*

as a quid pro quo for shifting the operation and resuming distribution in New York under the jurisdiction of Local 757. Was that not the case? A. I don't think so—may I answer the question?

Q. Yes. A. In light of what you said, in the course of the negotiations with Tom Parsonnet's item number 34 was an attempt to solve item 34 problems as it had been solved in Swift—I think those computations answer this.

Q. I'm afraid, Mr. Leyden, that you either misunderstood, or somehow failed to answer my question.

Wasn't the Swift agreement one made after the event rather than before the event? A. In fact I think it was but the point I'm trying to make to you is—

Mr. Cohen: Well, I object to that—forgive me, I think the witness ought not to argue, unless your [107] Honor wishes to hear this.

The Court: What is the question?

Mr. Cohen: The question is simply whether the Swift agreement was not one which was negotiated and entered into a substantial time after the closing of the plant, rather than in advance.

The Court: Can you answer that?

The Witness: I believe the answer to that is "yes," your Honor, but I do feel—

The Court: Well, that is the answer.

Mr. Cohen: Thank you very much, Mr. Leyden.

The Court: Mr. Cannon, do you have anything more?

Mr. Cannon: No, I think not.

Thank you, Mr. Leyden.

(Witness excused.)

\* \* \*

[118] IRVING R. SEGAL, called as a witness by the defendant Kraftco, having been first duly sworn, was examined and testified as follows:

*Irving R. Segal—for Defendant—Direct*

*Direct Examination by Mr. Cannon:*

Q. Mr. Segal, will you identify yourself to the Court? [119] A. My name is Irving R. Segal. I am a member of the law firm of Schnader, Harrison, Segal and Lewis of Philadelphia.

Q. How long have you been a partner of or associated with that firm? A. I became associated with the firm in 1939, and have been continuously associated with the firm.

I was out in the Army for three and a half years. Other than that I have been with that firm—and for eight months' service with the OPA prior to going into the Army. I became a partner very late in my career, I think after ten or eleven years.

Q. In the practice at Schnader, Harrison have you concentrated in any particular areas of practice? A. Until a few years ago I concentrated heavily in labor law and labor relations; also I did trial work but the labor field was my main field. I was for a number of years chairman of what we call the labor committee of the firm.

Q. In connection with your labor law activities could you just generally describe what you have done over the years? A. Well, our firm represented individual companies but a large part of my work was representation of industry [120] groups, groups of employers negotiating with one or more unions.

I participated actively in the negotiations, in resolution of grievances, in the formulation of pension and welfare plans when that became popular in Philadelphia, starting in the early 50's, and where necessary, in labor litigation, by which I include arbitration and adversary proceedings be-

*Irving R. Segal—for Defendant—Direct*

fore the National Labor Relations Board, the State Labor Relations Board—the full gamut of labor law and labor consultation.

Q. In the course of your work with pension matters I believe you said you advised joint industry funds? A. Yes, starting early in the 1950's we were reputed to have the first multi-employer-multi-union fund which was created in the milk industry among, I think, about 15 employers and I know four unions.

I personally drafted all the papers, really created that fund.

We had no model in Philadelphia. Then for a number of years, I served as counsel for both the unions and the employers in administering that fund.

Following that there were other funds—the Ice Cream Fund and a number of other industry funds with which I have had a connection.

[121] Mr. Cannon: If you'll excuse me for a moment, I would like to establish—I do not know that this has been done anywhere in the record yet—that Aaron Solomon of the Solomon & Rosenbaum firm is and was at all relevant times with Mr. Cohen the co-counsel to this particular fund, at all relevant times before us.

Mr. Cohen: There is no objection to that, your Honor. It is a fact, I believe, that virtually from the time of the establishment of the Ice Cream Industry Fund here involved, that Mr. Solomon or his office and myself and/or my office were co-counsel to the Fund, and that still prevails.

Your Honor, I am glad to stipulate that.

*Irving R. Segal—for Defendant—Direct*

*By Mr. Cannon:*

Q. In the course of your work on pension plans, have you dealt with actuaries, read their reports and discussed actuarial matters with them? A. Yes, sir.

Q. You would then have a general understanding, sufficient for professional purposes, of the actuarial science? A. Yes. I am not an actuary, I never studied the subject, but one of my functions, particularly with industries which my brother and I had represented over many years—the industry would look to us to interpret [122] the effect of actuarial reports. Of course these pension funds had regular evaluations. Then we had evaluations when a new member would want to come in, as to the effect of the new employer with his employees becoming a member of the fund, and so we would get an actuarial report of that.

I would say I knew more about it than my clients, and therefore I would interpret the general effect to my clients, with the aid of the actuary.

Q. This is a joint operation, is it not? A. Surely.

Q. Now Mr. Segal, with respect to the Sealtest Foods Division of what was formerly known as the National Dairy Products Corporation, when did you first have a professional connection with that company? A. Well, I think the milk industry in Philadelphia was organized by the unions shortly after I became a lawyer, and I think it was my brother who represented that industry and I was his assistant, so I would say my first contact with Sealtest and the other employers in that industry was in 1939 when I entered the firm.

Q. Let me direct your attention to the period— A. I would say 1940, Mr. Cannon.

*Irving R. Segal—for Defendant—Direct*

Q. Let me direct your attention, then, to the period in 1968 and shortly prior thereto.

[123] In what capacity were you serving the Sealtest Foods Division? A. Could I explain a little bit about my relationship to Sealtest nationally?

Q. Please. A. In the period that you are now referring to, the President of the Sealtest Foods Division, of what was then the National Dairy Products Corporation, was John Edwards. John Edwards had for many years been connected in various capacities with the Philadelphia division of Sealtest Foods, and he came to have responsibility for the labor relations functions and attended the meetings of the industry, and we came to be fast friends, and of course had a lawyer-client relationship.

When he became President of Sealtest Division not long thereafter he asked me to become an advisor on a national basis in labor relations matters of the various Sealtest operations, and work with David Campbell, who was the personnel director; and later Mr. Gilmore Scholes, who was his assistant, and there was a continual relationship, very often by phone, sometimes in person, using me as a sort of sounding board on labor relations problems around the country and in Canada.

I did not participate actively in most cases, [124] except in Philadelphia and to some extent the New York and New Jersey market, but I was a sounding board.

That is the best way to describe it, Mr. Cannon—a labor relations advisor.

Q. Mr. Segal, I would like to hand you what has been received as Defendants' Exhibit Q (handing), the January 24th letter to Mr. McGinley, inviting discussion with respect to the closing of the Newark production facility.

*Irving R. Segal—for Defendant—Direct*

Were you involved in any way in the preparation of this letter? A. My file reveals a copy of this letter, and it is my recollection that I dictated it, I think, over the telephone to Mr. Ashenbrenner, Vice-President of the Breyer Division.

Mr. Cohen: Forgive me, this may be just a bit premature, your Honor, but I thought it would be best to have the record clear on it. I would respectfully request, if it is agreeable to your Honor, that the same objection previously made would prevail here, and then I won't get up to object, unless there is something special that comes up—I won't be obliged to interrupt that frequently—the objection based upon these matters being merged into the ultimate agreement.

[125] The Court: Yes.

Mr. Cohen: Thank you.

The Court: I will not misconstrue your silence.

Mr. Cohen: Thank you very much, Judge.

*By Mr. Cannon:*

Q. After the dispatch of this letter, Mr. Segal, did there come a time when you became more actively involved in the Newark situation? A. Well, I had a number of phone calls about the Newark situation with Mr. Ashenbrenner, and maybe Mr. Mott, but my first—I guess what you would call active participation, was in mid-March when we had a meeting on this.

Q. And what was the general purpose and result of the meeting? Who attended and where was it held? A. May I refer to these notes?

Q. Yes.

*Irving R. Segal—for Defendant—Direct*

Mr. Cannon: Mr. Cohen, he has in front of him—  
The Witness: These are my handwritten notes of the meeting, and I couldn't positively remember all the names, really, if I did not refer to it, if you don't mind that.

Mr. Cohen: If you will be kind enough to state for the record whether those are notes which we have [126] already referred to or already put in the record.

Mr. Cannon: Yes, we have referred to them (indicating). They are not in the record. The witness will use them to refresh himself on dates and things like that.

I have no desire to put them in the record.

A. I wouldn't either, except for the names. May I do that?

(After examining) Vaughn Ashenbrenner—these are my notes on the meeting on March 14, 1968.

I am assuming the meeting was in Philadelphia, because it doesn't indicate to the contrary.

Present were Vaughn Ashenbrenner, Don Mott, John Musser and Dave Campbell—and of course I was present—and the general tenor of the meeting was to review the contacts that Mr. Ashenbrenner had had with Mr. McGinley prior to the letter of—prior to Exhibit Q.

Q. Prior to— A. And subsequent to that letter, which were to my recollection, largely frustrating—

Mr. Cohen: Forgive me, is it clear that the meeting that the witness is describing is one at which or

*Irving R. Segal—for Defendant—Direct*

during which no one from the plaintiffs was present—that it was a meeting exclusively of company representatives?

[127] Mr. Cannon: That is correct, and I won't belabor what was said.

Q. The only point, Mr. Segal, is, did there, as a result of that meeting and other meetings, come a time when you personally made an effort to establish contact, directly or indirectly, with Local 680? A. Yes. I was asked to try to contact Local 680 through its attorney, Tom Parsonnet.

Q. Let me pause for a moment at this juncture. The Newark situation that we are talking about, could you describe what that involved, from the point of view of the company? A. Yes. There was a production plant and a distribution facility in connection with it; that is to say, a Breyer ice cream plant and distribution facility in Newark, which was a relatively small operation, about 2,000,000 gallons a year, which among big companies would be regarded as a small operation.

Q. How much would Long Island be, for example? A. I would guess between 10 and 15 million gallons I would think the capacity would be at least 15 million gallons—perhaps more.

There were problems with this plant. It couldn't be modified. It was limited. It had reached its [128] limited capacity of 2,000,000 gallons, and it was an uneconomical operation, and Sealtest and Breyer—I should say that Sealtest Foods were all Sealtest companies except Breyer. But Breyer was a division of Sealtest Foods that retained its own name.

*Irving R. Segal—for Defendant—Direct*

The company had made a determination that it was uneconomical to continue that Breyer facility and wanted to close it. There were contractual limitations to closing it. There was a prohibition in the contract. You couldn't close a plant without violating the contract, and they sought to get an amicable closing.

So notice was given in this letter of January 24, 1968, Exhibit Q, of an intention to close it after the contract ended, but the objective was to do it amicably, and I was an emissary to see if it could be worked out along the lines of the prior experience I had with the same union.

Q. Work it out amicably—how does this relate to—in what areas did you want the cooperation of the union? Was it just a matter of closing the plant? Couldn't you padlock it and walk away from the contract? What did you want to do? A. The objective of the company was to discontinue the production of ice cream at the Newark plant, to move that production into the large facility in Long Island; to [129] bring the ice cream from Long Island to a distribution facility in Newark and to distribute that ice cream through the same Local 680 employees in the area in which it had previously been distributed, and to achieve that at a cost which would make it economically feasible to the company.

Q. This other situation that you mentioned analogous, or somewhat analogous situation, was that the Swift situation? A. Swift & Company—that is to say, as I recall it was called the Poultry & Ice Cream Division of Swift.

Swift had a somewhat similar situation involving a decrepit plant in Brooklyn, New York, ice cream plant. The production facility was in Brooklyn.

In that case I was assigned to meet, in that case, with both Mr. Parsonnet and Larry McGinley, both of whom I

*Irving R. Segal—for Defendant—Direct*

knew well, to try to work out that situation by a sort of reverse procedure—closing the Brooklyn plant, having the production taken over by an existing plant of Swift & Company in Woodbridge, New Jersey, under the jurisdiction of Larry McGinley's union, and continuing the distribution in Northern New Jersey.

Q. It appears to me to be the reciprocal of the Breyer-Newark situation except the distribution facility was going to be located in New Jersey in both cases. [130] A. Yes.

Mr. Cohen: May I respectfully suggest that counsel do not characterize it as a "reciprocal" of anything, but to ask the witness—I dislike objecting on that ground, but I think counsel should not suggest the comparison.

A. It seems to me, Mr. Cannon, here that what occurred in the Swift case was the production—in effect, in that case, of less than 2,000,000 gallons, as I recall it, came over from the New York union to the New Jersey Union—in the Breyer case the production would go from the New Jersey union to the New York union. In both cases the distribution would remain in Northern New Jersey under Local 680.

Q. Mr. Segal, I will show you what has been received as Exhibit J in evidence, a copy of the Swift agreement (handing).

(Witness examines.)

Q. As to what it provides that document, of course, will speak for itself, but does that represent the entire solution of the problem, or should it be considered in its broader sig-

*Irving R. Segal—for Defendant—Direct*

nificance? What were all the elements in the solution that was worked out?

Mr. Cohen: Forgive me, is counsel referring to [131] the Swift situation or the Breyer?

Mr. Cannon: To the Swift.

A. You are asking me whether this agreement of April 21, 1966 represents all of the solutions that were involved in effecting the objective I described in the Swift situation?

Q. Substantially. A. Certainly not. My participation in the Swift situation was to endeavor to convince Larry McGinley and Tom Parsonnet, his attorney, to cooperate in the objective already in mind, and that objective involved closing a plant under the jurisdiction of Local 757 of the Teamster's Union and taking over of that production by Local 680.

What I mean by the similarity was that the assurances that had to be given to the unions as a group were quite similar in both cases—that is to say, that it was economically good for both the union and the company to accomplish the objective I described, and that the affected people would be protected and that the same pension fund you are talking about would not suffer by reason of the transaction.

So the three objectives were similar. That is why the analogy was drawn, and that is why I think I was assigned to this job—that is to say, to the Sealtest job [132] because I had had that objective.

Now I met with Larry McGinley and Tom Parsonnet a good bit before the agreement of April 21, 1966—

Q. Exhibit J? A. Exhibit J—in order to get across to them the economic objectives that I felt were mutual between the company and the union, and the assurances which I felt they would more readily accept from me be-

*Irving R. Segal—for Defendant—Direct*

cause of past relationships and mutual confidence, I think, between us, as to taking care of the people who were terminated and as to making whole the union for any affect that the termination of those people—I mean, the pension fund, for any affect that this might have on it.

The thought was that my assurances might be more readily acceptable, so that the convincing procedure took place long before the ultimate agreement.

Q. The ultimate agreement being— A. Exhibit J—and it was not one meeting, Mr. Cannon; it was a procedure over a period of time.

Q. The Swift procedure. A. Yes.

Q. Mr. Segal, without getting into the details of any discussion, did you discuss the details of the Swift situation with your Sealtest clients? [133] A. I should make clear that I did obtain the permission of the Swift people —let me start again.

By the time the Sealtest situation arose, the Swift situation was entirely over, and I obtained the permission of the Swift legal department in Chicago to discuss the details and show the papers to Sealtest, yes, and I did so.

Q. Now let us get back to the Newark situation. A. You mean now the Breyer situation?

Q. Yes, the Breyer situation, excuse me. A. All right.

Q. I believe you indicated that you were asked at some time to take a personal effort in establishing contact between Sealtest and Local 680.

What did you do to prepare for that; whom did you see and what did you do? A. Well, I had the meeting on March 14th. My notes of that meeting—and I do not take too voluminous notes but I do for myself—were over three pages of notes.

*Irving R. Segal—for Defendant—Direct*

I went into the entire history from the initial decision to close down the production facility of Breyer Ice Cream in Newark and attempt to continue the distribution of Breyer Ice Cream in Newark.

From that initial decision until the day we [134] met, I investigated with these people whom I have named to you the objectives of Breyer and Sealtest with respect to that market.

Mr. Cohen: Forgive me, are we now referring, Mr. Cannon, to the same meeting as to which we previously agreed there were no plaintiffs' representatives present?

Mr. Cannon: For a different purpose, to establish, your Honor, the background work that this lawyer went through to prepare himself for a meeting with a representative of Local 680, and to present at this meeting information relevant to a matter on which the Sealtest attorney wished to have the cooperation of the union's attorney.

The background is helpful, I think, to show that the witness very carefully prepared with respect to all aspects of the matter at hand, presented them to the union's attorney; but as far as anything relevant to the union's understanding or state of mind, obviously it will only arrive out of the conversation with Mr. Parsonnet rather than anything he can do ex parte to Mr. Parsonnet.

Mr. Cohen: So the record will show our objection except the simple background purposes, your Honor.

*Irving R. Segal—for Defendant—Direct*

A. Well, what I was going to say, Mr. Cannon, is [135] that I got from these people facts and figures to use with Mr. Parsonnet, to try to convince him to convince Larry McGinley to cooperate in this effort.

Q. In what areas did you get facts and figures? A. The

plans of the Sealtest Foods Division and the Breyer Division, on advertising and promotion of ice cream.

We went into great detail, even to the extent of what was being spent on new packaging. The objective, of course, was that I wanted to convince Mr. Parsonnet that if distribution remained in Northern New Jersey of these products his union would not only retain the distribution people—the drivers, the box men—men who load out from the freezer—automotive repairmen and the like—that there was every likelihood that the amount of those people would increase because Sealtest-Breyer was going to make a real effort and had already started to promote ice cream in that area.

I should say I also had received assurance, positive assurance from the President of the Sealtest Division that if this arrangement couldn't be amicably arrived at, the Breyer and Sealtest ice cream would leave that market—the labels, they call it, would go out of the market—there would be no market or distribution.

[136] Q. Was there any item of particular concern to the union? Did you do anything about that? For instance, in the severance pay area? A. We discussed the severance pay. I informed my clients that it seemed to me that Mr. McGinley would want a more liberal severance arrangement than their contract calls for—I mean the industry contract provided, and I received rather broad authority to be liberal in that regard if we got into negotiations.

*Irving R. Segal—for Defendant—Direct*

The Court: These matters are immaterial, Mr. Cannon, these details.

Mr. Cannon: I think it is important, your Honor.

Q. If you could, Mr. Segal, put these things in the context of your discussion with Mr. Parsonnet. A. Would you like me to do that?

Q. Yes. When did you meet with Mr. Parsonnet? A. You asked me how I prepared for it. I had one other meeting before that.

Q. Yes. What was that about? A. On April 5, 1968, I met with a man named Philip Spangler—I honestly do not recall him, but I know he was an assistant to a man named Aubrey White, who was the actuary we used in the Philadelphia ice cream industry.

[137] Q. What firm? A. It is now Peat, Marwick, Mitchell & Company. It used to be Ostheimer.

I met with him, Don Mott, and a man named Robert Zogby, who was a production man—I think production or sales or both, with Breyer.

Q. When did you meet with Mr. Parsonnet? A. I met with Mr. Parsonnet, on my time sheet—isn't it April 11, 1968?

(After examining) I have my time sheet—I think it is April 11th.

Mr. Cannon: I will offer the time sheet in evidence, if there is no objection.

(Mr. Cannon hands to the witness.)

*Irving R. Segal—for Defendant—Direc'*

A. No, this is the wrong one—yes, it is attached to this—April 11, 1968.

Q. Where did you meet with Mr. Parsonnet— A. Mr. Cannon, you have put together the two sheets—the second of these is April 11th, 1968.

I met with Mr. Parsonnet at a restaurant in Newark, New Jersey.

Q. Will you tell the Court, as best as you can recall it, what was said at the meeting—what you said to him and what he said to you. [138] A. Well, I told him that efforts to meet with Larry McGinley on the subject of closing the Newark Breyer plant had not been successful; that obviously I wasn't going to ask him to meet with me if he was reluctant to meet. He was part of a large negotiating group, and therefore I assume knew I was asking to meet with him, and hoping he would convey what I said as exactly as possible to Mr. McGinley.

I told him first that Sealtest was going to close the producing plant, the production facility in Newark, and if we couldn't get together—as that phrase is understood in labor relations—maintaining distribution in Northern New Jersey, out of Newark, Sealtest was prepared to and would leave that market.

I considered it very important to convince him that that was a fact, and I think, you know, I relied on our relationship that he would believe me on that. That is what I said: "I hope you will believe me on that."

Then I said, "The alternative will be to discontinue the production. Those people would have to leave and we will talk about that, to continue the distribution," which, as I recall, would be about half the people—something like half the people.

*Irving R. Segal—for Defendant—Direct*

Then I said, "I would like to go with you [139] into some detail as to the plans that Sealtest-Breyer has in this market."

It is important, just for a sentence or two, to tell you what I described to him about the present distribution of Breyer.

Breyer Ice Cream did not have a large distribution in large food stores. That kind of business, if you are a big seller to large food stores, can be taken in a block and moved to a competitor if you leave the market. And obviously if a large block goes to a competitor, that competitor will have to hire more people, and presumably they would be Local 680 people.

Breyer Ice Cream had the kind of distribution which we call Mom-and-Pop stores—little stores—only five percent of the big food chain distribution, and I made an effort to convince Tom Parsonnet that if Breyer left this market Local 680 wouldn't get the people out of it because the ice cream would be distributed among a lot of competitors and there would have been no additional employment.

My point was to describe to him the efforts that were going to be made—a million dollars worth of advertising, the realignment of the sales function, to be of a specialized nature—I need not go into detail unless [140] you want me to—the new packing and a whole effort that had been started back in November to make Breyer Ice Cream a bigger factor in this market.

I showed him figures which I had in my notes, that there had already been a turning point from a decline in the number of gallons, that it started to climb, so I said "If you will accept this proposition of leaving the distribution, you will get the people"—and I outlined the people he

*Irving R. Segal—for Defendant—Direct*

would get, including salesmen—I even went into the salaries of the salesmen—"and I think it is clear that you will increase those numbers"—

Do you want me to go on?

Q. I want to interrupt for just a minute, Mr. Segal.

\* \* \*

[141] Q. So that you can go ahead, Mr. Segal. A. I might say, of course, I should have said that I reminded him that we had amicably, at least as far as Local 680 of Swift & Company, we had worked out the Swift & Company matter, and I said, "Now you know that I know we have to take care of the people who will be deprived of the jobs."

I said, "I do not know what can be done with them in the Long Island plant of Sealtest, because that is a different union, but I would think at the very least we could put them at the foot of the seniority list to get jobs when and if available there."

I said, "As far as severance is concerned, Tom, you know it will be more than the contract, and I can tell you that on authority that we are prepared to be liberal on severance."

I said, "That will be important when Larry speaks to his people."

I said, "The third element we discussed in the Swift situation is the effect, if any, on the pension."

I said, "We had made"—no, "we had had made a preliminary investigation of the effect, if any, of the people who would be terminated, of their leaving the pension plan, the industry-wide pension plan, and we were [142] convinced if anything it would be of benefit to the plan for these older employees with a lot of years of service to leave the

*Irving R. Segal—for Defendant—Direct*

plan, but if that should prove wrong and there were to be some effect on the pension plan we would of course be prepared to take care of that, but I did not think that would be a problem."

That took a long time—over an hour or so, and I think that I handed Mr. Parsonnet what I would call a fact sheet of the industry figures—the million dollars of advertising and the realignment of the sales, and those kind of things, and I said, "I hope you will tell this to Larry because I honestly think that it is best for everyone if we can do it this way rather than go out of the market."

He then—may I say that Mr. Parsonnet was an old man. He had been a good friend of my brother and had worked with him. I had worked with him some but I had to convince him that these three things were true, and he asked me that—he said, "Is it a fact that if we don't go along, if there is a problem you are prepared to leave this market?"

And I said, "I give you my personal absolute assurance of that being so, and I have it from the president on the highest reliance—and unless he dies, that that [143] will happen."

Secondly, Tom Parsonnet said to me, "Can you back up your assurance of liberality with respect to severance?"

I said, "If Larry isn't satisfied I don't know that I will be in the negotiations; you call me, Tom. You call Bud"—they called me Bud—"You call Bud Segal."

Third, he said, "How about the pension? Suppose it has some adverse effect?"

I said, "I told you already that I doubt very much, and you know, Tom, that these are older people. It can't have much effect, but if it turns out that it has some effect, it

*Irving R. Segal—for Defendant—Direc.*

was worked out in Swift, we will work it out. I give you my assurance."

I gave him personal assurance of this, and with that he said, "I will convey it to Larry," and we departed. My time sheet indicates that it was about two hours.

Mr. Cannon: I refer the Court to Exhibit I which are Don Mott's notes of the April 25th, 1968 meeting and the references therein at page 1, "Larry agreed that Parsonnet told him everything Buddy told Tom."

The Witness: "Buddy"—yes, sometimes they called me "Buddy." My notes indicate that I went back to [144] the meeting and met with a couple of my people and called Don Mott and reported.

Q. Now with respect to the preparatory conversations with Mr. Spangler, could you tell the Court essentially what he did or what he told you that he had done in analyzing the actuarial problem presented?

Mr. Cohen: Forgive me. I believe I must object that this is not appropriate. This is a discussion outside the presence of the plaintiffs, between counsel to Kraftco and someone they were consulting.

The Witness: Well, perhaps I could help by saying I don't remember what he told me.

(Laughter.)

The Witness: (Continuing) But I have a piece of paper—I think maybe I could help, Sam [Mr. Cohen], but I have a piece of paper that he handed me with some computations.

*Irving R. Segal—for Defendant—Direct*

The Court: I think the objection is well taken.

The Witness: I am sorry, your Honor. He handed me a piece of paper. I don't know whether that is evidentiary or not, and I have it here.

Mr. Cannon: Well, it has been stipulated as evidentiary, subject to relevance and materiality.

Mr. Cohen: Well, if we have stipulated we do [145] not object to the authenticity of various papers, but I think we intended to reserve other objections, and the objection I voiced in the early discussion would apply here.

Mr. Cannon: That I understand to be a hearsay objection, and a hearsay objection is not taken up on an objection basis upon relevance and materiality—it is competence.

The Court: Well, the objection is sustained in any event.

Mr. Cannon: Your Honor, the pre-trial order recites, on page 13:

"The documents presently expected to be offered in evidence by plaintiffs and by defendants are listed on Schedule A annexed hereto. The foregoing Exhibit references are to the documents listed in Schedule A. The admissibility of all such documents is hereby stipulated subject only to relevance and materiality objections. Copies may be used in lieu of originals."

Then there is a provision with respect to the offer of additional documents, and one of the documents listed in annex A—

The Court: Well, I do not think it is either relevant or material.

*Irving R. Segal—for Defendant—Direct*

[146] *By Mr. Cannon:*

Q. Mr. Segal, there has been previously marked in evidence—well, let me ask you the question directly, did the Breyer Agreement, Exhibit— A. J.

Q. Exhibit 15. A. Oh, I am sorry.

Q. —plaintiffs' Exhibit 15—(handing)—did you review that agreement on behalf of Sealtest before it was signed? A. May I have a moment on this?

Q. Certainly. A. (After examining) It was shown to me and I read it, and I reviewed it, yes.

The reason I am hesitant about it is that my partner, James Leyden, whom I asked to handle this matter, was in charge of it. He showed it to me and said, "Does it look all right to you?"

Q. Does Exhibit M. in your handwriting, does it establish that you saw that document on or prior to May 11th? A. Mr. Cannon, the reason I am a little hesitant about it is that I saw a handwritten provision before I saw this, and if I didn't—

The Court: You are now referring to Exhibit 15?

[147] The Witness: Exhibit 15, your Honor.

A. (Continuing) I thought I had seen a handwritten version of provisions of this agreement which I reviewed. I am not positive that I reviewed the final typewritten one. That is why I am hesitant. However, it is familiar to me.

The Court: Would this be a good time to take a recess?

*Irving R. Segal for Defendant—Direct*

Mr. Cannon: Your Honor, I think on that last point it may be easy to resolve the question if Mr. Segal would read his note.

Q. It says something about an address at Long Island?  
A. Well, if you will tell me that this is a transmittal slip, which is my formal transmittal slip to Mr. Leyden, it was attached to Exhibit 15, then of course I reviewed it.

Q. I cannot tell you that, but I can tell you that no handwritten document contains a Long Island address. A. Then I reviewed this and I referred to it in my transmittal note, sending it back to Mr. Leyden on May 11, 1968.

Mr. Cannon: Thank you, your Honor.

(Recess taken.)

[148] Mr. Cannon: At page 19 of Exhibit 18, the redetermination, the actuary says, with reference to the approach taken in accordance with Kraftco's contention as to the interpretation of the agreement:

"The Defendants' proposal leaves out of account the Breyer employees who had retired before the closing date"—

Mr. Cohen: Will you give me the page, please?

Mr. Cannon: Page 19.

Mr. Cohen: Page 19. Thank you.

Mr. Cannon: "The Defendants' proposal leaves out of account the Breyer employees who had retired before the closing date and were still on the pension rolls."

*Irving R. Segal for Defendant—Direct*

*By Mr. Cannon:*

Q. Was there anything discussed between you and Mr. Parsonnet about previously retired employees? A. Oh, no, sir—just the people who were going to be terminated.

Mr. Cannon: I have no more questions, your Honor, except I would respectfully, with reference to the document proffered, it is a one-page sheet of paper—I would like to make an offer of proof with reference to it. To the extent that that state of mind, with reference to the content of that document, is relevant, the document will [149] reflect the calculation essentially as follows: the contributions of Breyer employees at Newark calculated as a present value from May 1, 1968 down to the date of their retirement, and it offsets against that value actuarial savings resulting from the fact that those employees were leaving earlier than would be the case if they had stayed to retirement, and as a result certain benefits had accrued but had not yet vested, were forever lost to them, and it represented an actuarial gain to the fund. So that is what that document will show as to the state of mind of the corporate defendant.

The Court: What document?

Mr. Cannon: I am sorry, I should identify it by the pre-trial order. It might be sufficient. When I was talking before I did not mention it—pre-trial order document number 29.

Mr. Cohen: Of course my objection will continue.

I believe Mr. Cannon is referring to the same material as to which your Honor earlier sustained my

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objection, on the basis of it being both irrelevant and immaterial, and I would stand on my objection now that counsel has further indicated his purpose.

Mr. Cannon: I just wanted to make the offer [150] for the record.

The Court: This is listed as a one-page type-written document prepared by Peat, Marwick, Mitchell & Company.

Mr. Cannon: We can mark it for identification.

The Court: That is what you had better do.

Mr. Cannon: May I ask the witness first?

*By Mr. Cannon:*

Q. Is this the document that you have among your notes, and the one that you referred to in testimony (handing)?

A. (After examining) Yes. I have a few handwritten things on it, but yours does not have the handwriting. Otherwise it is the same.

Mr. Cannon: Thank you.

(Document previously marked pre-trial exhibit number 29 now marked Defendants' Exhibit R for identification.)

Mr. Cannon: I have no more questions, your Honor. Thank you.

*Cross-Examination by Mr. Cohen:*

Q. Mr. Segal, as I recall your testimony, in a conversation you had with Tom Parsonnet for the purpose, [151] I believe, as you put it, of persuading him to persuade Mr. McGinley to reach an agreement with Sealtest concerning

*Irving R. Segal—for Defendant—Cross*

the closing of the Breyer plant, among other things, you testified that you told Mr. Parsonnet that as a result of that million dollar advertising campaign, which you said the company was prepared to enter into, the union would probably increase rather than decrease its membership.

Have I misquoted you? A. No, you have not.

Q. Thank you. Mr. Segal, as a matter of fact, do you know—and I am merely asking you at this point, do you know whether since the closing of the Breyer plant the number of Sealtest employees in the ice cream industry under the contract with Local 680 were increased or decreased? A. I'm sorry.

Q. The question is, do you know? A. You confused me a little bit.

Q. I'm sorry. I will try to clear it up. A. As to the locale of this employment?

Q. Let us go back to your statements.

I believe you have agreed with me that your statement, in an attempt to persuade Mr. Parsonnet, was that it was your belief and you felt that instead of a decline [152] in membership, Local 680 might well have an increase in membership. All right. Now of course we are not referring to other companies; we are talking about the Breyer Ice Cream operation.

Do you know as a matter of fact—my question is merely limited as to whether you know—whether the membership thereafter declined or increased?

Mr. Cannon: Objection to the relevance.

The Court: I guess it is, strictly speaking, Mr. Cohen.

What difference does it make what the fact turned out to be afterwards?

*Colloquy*

Mr. Cohen: I suppose, your Honor, I could only say that Mr. Canon has in various aspects attacked the validity of the assumption which he says underlay the actuary's determinations here—both of them—that there would be a decrease in membership. I believe Mr. Cannon has quite forthrightly admitted that. Then he has presented a witness who was involved in the preliminary talks who honestly acknowledges that he told Mr. Parsonnet that the membership might even increase. He did not see any real likelihood of a decrease. I believe all that was offered to support a finding on the record that the assumption of a substantial decrease in employees on the [153] basis of which contributions would be made to the Pension Fund was an unfounded assumption. If it is understood that no such claim is made I certainly should not pursue this, and I thought therefore merely the fact which we assert that there was a substantial decline, in fact, that it was not an unfounded theoretical, and false assumption, that it might be something your Honor was interested in, I suppose, even as to that, if it were not, as I myself have argued, to get into the calculations, perhaps on that basis, if all that goes out I should not trouble Mr. Segal further, but if any of that stays in, I think the record might require some indication that indeed there was a substantial reduction in membership due to the closing of the Breyer plant, and I should not say any more about it. That is the basis of my question, your Honor.

*Colloquy*

Mr. Cannon: Your Honor, Mr. Cohen misapprehended the argument. The point is that the actuary was not entitled to assume as a predicate for alarming predictions with reference to the future of this fund, that this Breyer closing represented a radical change in the economics of the industry that had to be viewed as the first step in the decline of the industry. It was illegitimate for him to make that assumption if the parties who were working out the Breyer Agreement and communicated with reference [154] to it, made no such assumption themselves. It is not a matter of fact so much of the legitimacy of the assumption as a proper interpretation of the parties' intent.

The Court: Suppose all the employees for the Breyer plant had somehow gotten employment at the Long Island plant, then I suppose the pension fund would not have lost anything?

Mr. Cannon: I should think not, your Honor.

The Court: So that at least the subject matter is relevant in the discussions between the parties.

Mr. Cannon: I am not sure that I understand your Honor. The subject matter—

The Court: Is this going to get us into a lot of collateral matter as to what happened to the ice cream industry in the last five years, and what happened to all the people who were employed at the Newark facility?

Mr. Cohen: Insofar as your question is addressed to me I would say, "no," your Honor.

I have a very simple, brief purpose in mind, and that is merely to show that regardless of the statement which this witness honestly admits that he

*Irving R. Segal—for Defendant—Cross*

made, that the fact was that there was a substantial loss rather than an increase in membership due to the closing of the Breyer plant.

[155] The Court: Has the witness said yet whether he knew?

Mr. Cohen: He has not yet said whether he knew.

The Court: Then I will permit him to say whether he knows.

The Witness: No, sir.

The Court: Do you know?

The Witness: No, sir.

Mr. Cohen: Thank you, your Honor, for your assistance.

The Court: I am sorry that I prolonged matters.

Mr. Cohen: You have been very helpful.

The Witness: Your Honor, my answer was in the context of Local—

The Court: We are out of it.

The Witness: I just wanted to say I have some knowledge of national figures. I am talking about Local 680. I don't know that.

The Court: That is all he is asking about.

The Witness: The later colloquy seemed to go beyond that.

The answer is "no," sir.

[156] Q. You have testified to one or more conversations with Mr. McGinley, Mr. Segal; am I correct? A. In connection with the Swift matter.

Q. Did you have any conversation with him in connection with the Breyer matter? A. No, sir, not that I can recall.

Q. I will attempt to remind you of your earlier testimony, not directly that but you did testify that Local 680 was

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objecting to the closing of the Breyer plant because, as you put it very frankly, the contract prohibited the closing of the plant during the time of the contract.

Do you recall testifying to that earlier today? A. I do, yes.

Q. What I wanted to explore your knowledge on, then, was in connection with that.

Do you know whether Mr. McGinley gave as his reason for not entering into negotiations concerning the closing of the Breyer plant before April 25, 1968, that the existing contract required the company to keep it open, and he was not going to negotiate about it until the contract came to a close? A. Yes.

Q. I believe that your partner, Mr. Leyden, [157] testified yesterday that he was not certain who prepared the Swift agreement.

Would you know? A. Yes, sir.

Q. Was it you? A. No, sir.

Q. Could you tell us who did prepare it? A. (After examining) I forget the name. It was the labor relations—the chief of labor relations of the Poultry & Ice Cream Division of Swift & Company.

Q. By that do you mean that your office was not involved in either preparing or reviewing the text of the Swift agreement? A. The answer to that is you are right, except by telephone with my own client, Swift & Company.

Q. Does that mean that you did review the text of the Swift agreement by telephone with Swift? A. No, sir.

Q. Then let me change my question. Will you please tell the Court who, if anyone, connected with your firm either prepared or reviewed the Swift agreement and whether that was done orally or by telephone or by looking at a copy in your office? A. I believe that the agreement itself was [158]

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reviewed by a then associate of mine, name John Pelino, but I did not do it.

Q. Mr. Pelino is no longer with the firm? A. That is correct.

Q. Where is he, do you know? A. He heads a firm of his own, primarily in the labor field in Philadelphia.

Q. In Philadelphia? A. Yes.

Q. When did he leave the firm? A. Mr. Cohen—

Q. Approximately. A. Five years or so ago—maybe a little more—1967, I would say.

Q. He was a member of your firm or associate—I do not know whether he was a partner— A. He was an associate.

Q. —who was originally assigned to attempt to negotiate on behalf of Swift with Local 757 concerning Swift's desire to close their Brooklyn plant? A. I am disturbed by the word "originally." He was assigned.

(Continued on page 159.)

[159] Q. I will withdraw that. A. Yes, he did get that assignment, yes, sir.

Q. Can you help the Court by approximating the time when Swift was proposing to close their Brooklyn plant, if you recall? A. At the end of the then current contract which contained the same provision.

Q. Would that be 1965 or 1966, something along there?  
A. Yes.

Q. Is it the fact that no agreement was reached between Local 757 and Swift, and that the Swift Company closed the Brooklyn plant and withdrew from the local market without an agreement with Local 757 or any other union?  
A. Yes, sir.

Q. So that what was done later by way of the Swift agreement was sometime after the Brooklyn plant had been

*Irving R. Segal—for Defendant—Cross*

closed, without any agreement? A. Would you mind reading that back?

(Question read by the reporter.)

A. Yes, to get the product back into North Jersey, yes, sir.

Q. And was the period that had elapsed between [160] the time of the closing of the plant and the eventual Swift agreement a period of a year or more? A. I don't know, Mr. Cohen. It was a substantial period.

Q. It was substantial? A. Yes.

Q. Perhaps one year or two years, something of that sort?

A. Well—

Q. I am not asking for anything precise. A. Well, the agreement was 1966—I saw it today. I would say it could be a year.

Mr. Cohen: Forgive me a moment, your Honor. Thank you, that is all, Mr. Segal.

Mr. Cannon: May I have a moment, your Honor? No more questions.

Thank you, Mr. Segal.

(Witness excused.)

Mr. Cannon: Your Honor, if I may—

(Mr. Cannon confers with Mr. Cohen off the record.)

Mr. Cannon: I would like to call Preston C. Bassett, your Honor.

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*Preston C. Bassett—for Defendant—Direct*

[161] PRESTON C. BASSETT, called as a witness by the defendant Kraftco Corporation, being first duly sworn, testified as follows:

*Direct Examination by Mr. Cannon:*

Q. You are the Preston C. Bassett, are you not, that filed an affidavit, referred to in Judge Tyler's opinion and annexed as part of the Segal Company redetermination?

A. Yes, sir.

Q. Could you state your present position, Mr. Bassett?

A. I am vice-president and actuary for Towers, Perrin, Forster & Crosby, Inc., for shorthand purposes I will refer to it as TPFC.

I have been with TPFC as actuary for the firm since 1950.

Prior to that I was 10 years with the Prudential Insurance Company home office in Newark, where I got my training as an actuary. It would be fair to say that I am currently responsible for all of our actuarial and pension activities worldwide.

Mr. Cannon: Mr. Cohen, will you stipulate at this point as to his status as an expert on matters [162] actuarial, or shall we go any further?

Mr. Cohen: If it will help to save time I will be happy to stipulate that Mr. Bassett is a qualified actuary.

Q. Mr. Bassett, how does one—before I ask you how one becomes one, what does it mean to be an actuary? Is there a professional accrediting association?

A. Yes. The principal one in the North American continent is the Society of Actuaries. It has been organized for a number of years.

*Preston C. Bassett—for Defendant—Direct*

One of their functions is the training of others to be actuaries. It operates more like the guilds of Europe and England of olden days. It is not a legal entity but it is run by its members, and they establish the qualifications for others to become members through a series of examinations.

Q. With regard to the series of examinations, how many are there and how long do they take? A. At the present time there are 10 examinations, and they cover all aspects of the work that we do in the field of insurance and pensions and Social Security and that type of thing.

The examinations are given twice a year, and if you can get through in somewhere between five and eight [163] years you have done a pretty good job. It is mostly a self-study program under the tutelage, usually working with an insurance company.

Q. I think all of us are aware generally that an actuary is a mathematician. Is there a branch of mathematics that is especially relevant to actuarial science? A. A good liberal arts college education in math plus self-studies in statistics, and so forth, are all very important.

Q. Are there any State laws or Federal laws regulating actuarial science as there are regulating the practice of law or medicine? A. No. We are not subject to examination by the States or the Federal Government, as lawyers or accountants or doctors are. There is no examination that we have to take run by a State authority. It is all within our own organization, so we are not subject to State laws or Federal laws. There is no Federal accreditation of actuaries or State accreditation of actuaries.

Q. Does the Society have its own disciplinary mechanism? A. Yes. We have a Code of Ethics very similar [164] to the Code of Ethics of the accounting profession,

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for example. If a complaint is registered, it is investigated and disciplinary action may be taken.

Q. If the membership of the Society, which I suppose is the appropriate phrase— A. Yes.

Q. —if that is withdrawn doesn't that legally prevent the practice of it? A. No. Anyone in this room can say he is an actuary, and there is no legal problem. It has no legal status. It has only to be recognized in practice.

Anyone can say he is an actuary. Anyone can do so-called actuarial work but it does mean that we have a problem in our profession with people who may not be qualified to say they are actuaries.

Q. Just so that we do not create a misleading impression here, do you know Mr. Elkin? A. Very well.

Q. Do you know him to be a well qualified actuary? A. I certainly do.

Q. And a member of the Society? A. Yes, sir.

Q. In good standing? A. In good standing.

[165] Q. Now perhaps again following the analogy to accounting, talking about Generally Accepted Accounting Principles and Auditing Standards, what do actuaries talk about and how are those standards established? A. We don't have as rigorously defined standards as the accounting profession. They have their accounting principles board, and that has been reorganized. This is the Financial Accounting Standards Board today, and they are responsible for promulgating accepted accounting practices.

Now we don't have a board that sets forth accepted actuarial practices. Each actuary is expected to make his decisions that he thinks are proper in light of the circumstances of the case, and based on his training, background, experience, what his peers are doing, et cetera.

*Preston C. Bassett—for Defendant—Direct*

Q. Does an actuary issue—I take it that an actuary does not issue certificates, the way an accountant does? A. No. We give opinions, advice, but we don't certify, generally.

Q. If you could generalize about the areas in which an actuary operates, you have mentioned the mathematical aspect of it.

[166] Can you definitely categorize the other things that he does so that we can proceed to talk about how he does it?

A. Well, I will not explain the work we do for insurance companies or State departments and that type of problem. This is the field of pension evaluations and actuarial evaluations, and in this field you might say we have a kind of twofold obligation. We have to work with our clients in establishing the assumptions that we are going to use in determining the forecasts that we are going to make, assumptions as to whether the number of employees is going to expand or decrease; whether the funds are going to be able to earn a certain rate of interest; how long people are going to live. Then having worked out those areas, we apply mathematical formulae, and we make detailed mathematical calculations. So we have two problems—we have the judgment items and we have the formula application.

Q. With respect to the judgment items, is it typical of the actuary that he decides these matters of judgment or does he consult with reference to them? A. Well, generally we sit down with our client and discuss with him the assumptions that must be made, the basis on which we think the judgment should be made on these [167] items. We would talk to a client and ask, "Where do you think your employment is going? What do you think your fund is going to be able to earn in the way of investment income?"

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We may have some investment advisers come in and talk about that. We use all the input that we can—a study of past history, of mortality, investment rates, and we form a judgment, and I will advise the client as to what I think is proper for his situation. He may or may not take my advice, but I do advise them.

Q. Your advice is valuable, as I would characterize it, because you are a bright and able man who does think all the time. Is that about the size of it? A. Yes—thank you. That is based on studies that we have made, or others have made, or anything that we can use that we think is of significance to the case.

Q. We are generally dealing with projections as to the future— A. That is right.

Q. —such as future turnover rates? A. Mortality rates, retirement ages, inflation, where Social Security is going—all those factors enter into it.

Q. Are there contexts in which an actuary may act [168] more in the role of an expert or appraiser himself to decide these matters of judgment? A. Would you repeat that, Mr. Cannon?

Q. I might ask, first of all, is it common for an actuary to take the role of an expert to decide a particular situation, such as an accountant in connection with the sale of a business being brought in to determine what the net profits are, or what the net worth of the operation is? A. No. I think the area in which I specialize is mostly advisory work. You do not pound the table and say "This is what it has to be. Here is the way it can go. You may do this—and this is the type of thing that might happen. If you go this route, something else might happen."

Occasionally we are called in to testify in court on individual accident cases, where we will be asked what our

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opinion is as to the longevity of a person who has been in an accident, or may be killed or would have lived if he hadn't been killed—to determine the worth of his future earnings; but that is more of a judgment item.

Q. Mr. Bassett, we have made reference to the affidavit you previously filed and that is part of the [169] record, part of the redetermination. At that point what the affidavit recites you were doing is comparing what the parties had set out in other affidavits? A. Yes.

Q. An affidavit by Mr. Campbell, Mr. Cohen's affidavit submitted on the motion, and you made statements with reference to the application of your art in those circumstances.

What I would like you to do is to address yourself just to the Breyer Agreement, which is Exhibit 15 (handing).

(The witness examines.)

Q. Particularly with reference to Paragraph No. 3, does Paragraph No. 3 of the Breyer Agreement contain any terms of actuarial art? Does it have a unique meaning to an actuary?

Mr. Cohen: At this point, your Honor, in addition to the objection I have made as a general objection to previous testimony and to previous documents as being merged in the eventual agreement, I would also like to have the objection that in so far as this question or further questions will relate to a re-examination of the appraisal made by the Segal Company, that such re-examination is not proper under the authorities with [170] respect to appraisals and arbitrations.

The Court: Yes.

Mr. Cohen: Thank you, your Honor.

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A. I do not see any words in there that are unique to my profession other than perhaps the actuarial study.

The other words are general words that are used in the English language and not unique or have any particular actuarial significance.

Q. In particular the terms "impact" and "adversely affected", are they actuarial terms? A. No, not at all. Webster's is as good as any.

Q. Can you, as an actuary, determine from the Breyer Agreement the dimensions, if any, of the actuarial study suggested by the language?

Mr. Cohen: I think I should make a further objection upon the basis that the agreement in suit, if it requires construction, is to be construed by the Court rather than any actuary or other expert called as a witness.

The Court: You had better read me the last question.

(Question read by the reporter.)

[171] The Court: And what was the objection?

(Record read by the reporter.)

The Court: I think it is sufficiently relevant that an expert actuary express his opinion, and then the Court can give it such weight as may be proper.

Mr. Cohen: Thank you, Judge.

A. I think it only gives a very broad guide to an actuary.

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If I had this problem thrown at me, as Mr. Elkin did, it seems to me it is subject to several interpretations.

There is a wide spectrum of answers you might come up with when you can't choose between them without further information. It is too broad, it is too general.

The Court: If you were put in the position in which Mr. Elkin found himself, what would you have done?

The Witness: Well, No. 1, it is hard, after these two years, to know just exactly what I would have done.

The Court: Mr. Cohen, there is no reason why you should not object to the Court's question if you think it improper.

Mr. Cohen: Well, I have stated the general [172] objection, and I assume that your Honor would bear that in mind in consideration, in viewing the entire record.

The Court: Certainly.

Mr. Cohen: So that I will not rise again to object to specific questions.

The Witness: Your Honor—

The Court: And Mr. Cannon may also object.

Mr. Cannon: Well, not to that; it is perfectly proper.

The Witness: Your Honor, you don't normally get two sentences and they ask you to do a job. The usual procedure is that you visit with the client, he has a problem, and you sit down and talk about it, and you explore the different possibilities, and you find out what he is trying to accomplish, where his thinking is going—a lot more information than you

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would ever have in this one little paragraph, and I think this is the key—unless you have more you really cannot make a definitive determination that we can say "This is the answer".

Q. Going back to the Segal Company re-determination, which is Exhibit 18, you have read it, Mr. Bassett? A. Yes, I have.

Q. For shorthand we will refer to the three [173] approaches taken as the original approach, the defendant's or Kraftco's approach, and the alternate approach. A. Okay.

Q. Assuming for the moment—and I will get to that assumption in another way—that the redetermination sets the spectrum of choices on this Breyer Agreement, what is it—what words would you seek to elaborate upon in order to get at what the parties had in mind, so to speak? A. Are you also including in my consideration not only the Breyer Agreement but the material that was submitted in December?

Q. No, just looking at the Breyer Agreement— A. Yes.

Q. Let me ask you this question, did the original determination which had been rejected by Judge Tyler—perhaps I should not complicate matters, but would you, on this language, take that as an acceptable alternative with the others as an interpretation of the Agreement?

Mr. Cohen: I am afraid I do not understand the question.

The Court: Which one are you asking the witness about?

Mr. Cannon: The original determination.

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[174] Mr. Cohen: I am sorry to clutter up the record. Might I hear the question again?

Mr. Cannon: Perhaps I can rephrase it.

The Court: That is the one page—

Mr. Cannon: That is right, which is restated in the redetermination. It is well characterized.

Mr. Cohen: May I trouble counsel to restate the question? Perhaps I will have nothing further to say when I hear it.

Mr. Cannon: Perhaps I should get to my assumption first.

Q. I said I assumed that the redetermination had the three approaches mentioned:

The original determination, the Kraftco approach and the alternate approach.

Do they set in your mind the spectrum of possible alternative interpretations of this language? A. I don't know—I can't offhand think of any other original ones. I think that is reasonable—I wouldn't say the spectrum of figures is but the approaches cover the ones that would be considered, yes.

Q. And among them, can you come back to the Breyer Agreement and focus on the words in the Breyer Agreement that appear to you to be critical, if you were [175] forced to a decision as to which one was intended by the parties?

A. (After examining) No, not really.

I am a little hard-pressed to go the route of the original calculation. The other two are certainly within the meaning of this paragraph—the alternate and the Kraftco approach.

Q. Now I showed you, I believe, last evening, Mr. Bassett, a copy of the Swift Agreement which has been marked in

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Q. Have you read that document (handing)? A. Yes, Mr. Cannon.

Mr. Cannon: May I have a moment, your Honor?

Q. If you will just assume hypothetically with me, Mr. Bassett, on the strength of the Breyer language you asked its authors:

“What do you have in mind? What do you want me to do?”

Having read the Swift Agreement, if you were told that: “We would like to formalize the Swift procedure”, would you, as a matter of your profession, have a definite task to pursue? [176] A. No.

Mr. Cohen: I object to that hypothetical and irrelevant question.

The Court: I do not quite see how that is relevant, Mr. Cannon.

Mr. Cannon: The record establishes, your Honor, that the Breyer Agreement was considered by the parties to be of similar effect to proposal No. 34 in the negotiations between the unions and the industry, and on April 9, 1968, in introducing item No. 34 into the negotiations, Mr. Cohen as spokesman said that this, quoting from Exhibit B,

“We would agree to formalize the procedure”—and the reference is to the Swift procedure. The full quote from the exhibit, as you will remember, is what we negotiated with the Swift people when they terminated their business in Brooklyn.

Now I put before Mr. Elkin the Swift Agreement that was negotiated, and the Breyer—

*Colloquy*

The Court: Mr. Elkin?

Mr. Cannon: I am sorry—Mr. Bassett—and asked him if the reference to what we negotiated in Swift adds sufficient meaning to the Breyer Agreement to permit him to pursue a definite course of action.

[177] The Court: You might suppose any number of things that might have been shown to anybody. It does not get us anywhere. We have to get down, at the most, to what the parties may have said to each other at the time.

Mr. Cannon: This is—

The Court: Not primarily, of course, what they stated in writing, but now we are getting into what they said to each other at the time, and what, if anything, was said to Mr. Elkin beyond apparently knowing—beyond his being given a copy of Exhibit 15.

I do not see how the opinion of this witness helps or is relevant.

Mr. Cannon: Well, much more has been done now, your Honor. We are operating, at least according to our position and our understanding, within the confines or contents of Judge Tyler's order. Judge Tyler's order certainly set aside what Mr. Segal had done originally—excuse me, Mr. Elkin had done originally, precisely because, among others, that it was done, shall we say, with little attention to what was involved; but on the remand extensive arguments, certainly by our side, supported by reference to documents, all of which are in the record—that has been made part of the determination.

*Colloquy*

The Court: Well, on remand did you call the [178] attention of the actuary before whom the proceeding was conducted to the matter of what was in the Swift Agreement?

Mr. Cannon: No, your Honor, we did not.

The Court: Wasn't that the place to do it?

Mr. Cannon: Well, your Honor, I can establish by a letter from Mr. Cohen that they had a copy of the Swift Agreement but it was not formally presented at the hearing.

Mr. Cohen: I think Mr. Cannon will also concede that it was not argued or presented in any way—neither the document nor any argument related to it.

The Court: It is certainly not referred to in Exhibit 18.

Mr. Cohen: No, it is not. We also have a transcript—I am not certain whether it has been submitted but probably it should be as part of this record—the transcript of what took place at the remand ordered by Judge Tyler which will show that no one on behalf of Kraftco made any allusion whatever to the Swift Agreement.

The Court: Well, that is an exhibit, is it not, that is incorporated into Exhibit 18 by reference, as I understand it.

Mr. Cohen: Yes, indeed it is, your Honor; that is correct.

[179] Mr. Cannon: Yes, it is.

Your Honor, the direction to interpret, in Judge Tyler's order, was to interpret in accordance with the Breyer Agreement.

*Colloquy*

I will frankly concede that the documents that are part of the Swift situation came up in response to a direction issued by your chambers on October 11, and that prior to this time it is quite true I did not speak to Mr. Elkin in these terms, but if the record before Mr. Elkin is to be considered, the only record before him, as he states, was the record with respect to the facts tending to support us, and nothing from Mr. Cohen except "We think you have the authority to go ahead and interpret this any way you like"—and he came up with a procedure not selected by any party admittedly—not admittedly but in fact not suggested by any party. So the requirements of a decision made on the record are to be observed, we should not be talking about the alternate method at all, because it was not contended for by either party, and the original method was ruled out by Judge Tyler.

The Court: Now we are getting a little far away from where we started. I think we started with an objection, didn't we?

Mr. Cohen: Yes, your Honor. All this follows [180] my objection to the hypothetical question involving that.

The Court: And you were asking whether or not it would help if he had the Swift Agreement, and I feel I must sustain that objection.

Mr. Cohen: Thank you, Judge.

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*Preston C. Bassett—for Defendant—Direct*

[198] The Court: No, I think we had better go ahead with the next question, Mr. Cannon.

Mr. Cannon: May I have the last?

(Record read by the reporter.)

Mr. Cohen: I would assume, your Honor, that since the reporter's reading of the record shows that an [199] answer was given before my objection was heard, that the state of the record will indicate that the answer is stricken.

The Court: Yes, the answer is stricken.

Mr. Cohen: Thank you.

*Direct Examination By Mr. Cannon (Continued):*

Q. Mr. Bassett, looking at Paragraph 3 of the Breyer Agreement, which is Exhibit 15— A. Yes.

Q. —I believe your testimony is that you could think of a number of things that might be done in response to that language? A. Yes.

Q. If you were told, in addition, that what the parties had in mind is the situation where contributions are not made for the length of time contemplated, and where we contemplate the continuation of contributions until an employee is eligible for retirement, which among the three Segal determinations' choices would you follow, and would it be compelled under the circumstances as a matter of actuarial art?

Mr. Cohen: Objection, your Honor—strictly hypothetical and unrelated to any of the facts that have been adduced.

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*Preston C. Bassett—for Defendant—Direct*

[205] The Court: Well, I will take the witness' answer for what it may be worth, although at the moment I confess I cannot see the relevance of it.

A. The answer to the question is that if the parties instructed the actuary to determine the impact on the fund, of the withdrawal of these specific employees, and only with regard to these employees, then to me the only answer is the Kraftco approach. The alternate approach contemplates really the loss of the jobs in perpetuity, into the future. It is not concerned with the employees but the loss of positions and they go on forever.

When you talk about the employees who were terminated, then you get down to the Kraftco approach.

[206] Mr. Cohen: I guess merely for the record, your Honor—and I appreciate your Honor's comments—I would just move to strike the answer for the same reason.

The Court: Well, I will reserve on that.

Mr. Cohen: Thank you.

Q. Then this method described under the Kraftco heading on page 18 through page 21 of the redetermination, which is Exhibit 18, are matters of actuarial judgment and expertise involved in applying that redetermination? A. Yes.

Mr. Cannon: May I have one moment, your Honor?

(Mr. Cannon confers off the record.)

The Witness: Would you like me to expand on that, your Honor, rather than give a "Yes" answer?

*Preston C. Bassett—for Defendant—Direct*

The Court: What?

The Witness: Would you want me to expand on my "Yes" answer?

The Court: You better look to Mr. Cannon for that.

Mr. Cannon: Your Honor, frankly I know this is quite unorthodox, but these notions are very difficult.

I managed to convince myself that things follow as night the day in this area, and I do recognize [207] the great burden in doing so, because of the inherent complexity of the notions on present values and perpetual contributions, industry sales and employment in the industry, and a great many other things that go into this calculation.

So I have no more questions of my own for Mr. Bassett.

I know I would like to have him at my elbow, and anything that the Court would like to inquire of him certainly would be all right with me.

The Court: Mr. Cohen?

Mr. Cohen: Is the direct examination completed?

Mr. Cannon: Yes.

Mr. Cohen: Oh, I did not appreciate that.

If I may have a moment, I may have one or two questions, your Honor.

The Court: Yes.

(Mr. Cohen confers with Mr. Berman off the record.)

Mr. Cohen: I have no questions, your Honor.  
Thank you.

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**Opinion and OrderAppealed From  
Dated February 19, 1974**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

◆◆◆  
[SAME TITLE]  
◆◆◆

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LUMBARD, Circuit Judge\*

The plaintiffs, who are the union trustees of the Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Fund (hereinafter "the Fund"), commenced this action on March 27, 1970, on behalf of the Fund against defendants Kraftco Corporation ("the company") and the industry trustees of the Fund, asserting their right to recover a sum alleged to be due the Fund under an agreement

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\* Sitting by designation.

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entered into between Kraftco and Locals 757 and 680 of the unions ("the unions"), pursuant to which Kraftco terminated production at its Breyer ice cream plant in Newark, New Jersey.<sup>1</sup> Federal jurisdiction is based on

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<sup>1</sup> Certain individual parties to this action have changed since the date the action was brought. Anthony Iorio has been substituted as party plaintiff for Lawrence W. McGinley as President of Local 680, and Richard Mascuch has been substituted as party plaintiff for Lawrence W. McGinley as a union trustee of the Fund. In addition, Harvey J. Frem, Jr., Lawrence Bayard, Edward Drozd, and John Reisenberg have been substituted as parties defendant for Harvey J. Frem, Andrew F. Gruninger, Jr., Austin Puvogel, and H. Schuyler Todd as industry trustees of the Fund.

The individual industry trustees are named as nominal defendants only, for the reason that they refused upon request of the plaintiffs to join them in bringing the action on behalf of the Fund. It has been stipulated that no liability runs against the individual industry trustees and that any judgment recovered by the plaintiffs shall run solely against Kraftco Corporation.

Local 757 is Ice Cream Drivers and Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Its jurisdiction covers industry employees in the New York metropolitan area. Local 680 is Milk Drivers and Dairy Employees Union Local 680, also affiliated with the Teamsters. Its jurisdiction covers industry employees in northern New Jersey. Both locals are unincorporated associations and labor organizations within the meaning of section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. sec. 185.

Kraftco Corporation, prior to April 18, 1969, was known as the National Dairy Products Corporation. Sealtest Foods has been a division of the corporation at all times relevant to this action. The Breyer Ice Cream Company has been an operating unit of the corporation and, since January 1, 1957, an operating division of Sealtest.

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Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, and is also claimed pursuant to 28 U.S.C. § 1337. After lengthy pretrial proceedings, trial was had before the court without a jury for two days beginning December 5, 1973. The court finds the plaintiffs' claim, with substantial modifications, supported by the evidence adduced at trial.

The contract agreement in question, dated April 25, 1968, was a by-product of industry-wide negotiations held in April, 1968, between the unions and industry employers in the New York-New Jersey metropolitan area. The separate agreement covering the termination of the Breyer plant stemmed from Kraftco's desire to close the plant as unprofitable. Since such a closing would have been a violation of the existing collective bargaining agreement with the unions, and since it posed difficulties in regard to the forthcoming renegotiation of that agreement, separate provision was made to permit the closing to take place. This became the April 25th contract. The plant actually terminated production on November 2, 1968.

The contracting parties were concerned with the possibility that the closing would have an adverse effect on the pension Fund. In an effort to provide for this contingency, the parties agreed to the following:

3. The consultants to the pension fund [the Martin E. Segal Company] shall make an actuarial study of the impact, if any, of the discontinuance of operations and the termination of the employees upon the pension fund as of the date of the discontinuance of such operations, the cost of which shall be borne jointly by the company and the fund. If the consultants to the fund determine that the fund has

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been adversely affected as a result of the discontinuance of operations by the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants. The decisions of the consultants shall be final and binding on the parties.

The language seems unambiguous, but because of the nature of the Fund, it came to have seriously contested meanings.

The first step was a letter, sent on May 27, 1968, from Samuel J. Cohen, co-counsel to the Fund, to Irving McDougall, account executive of the Segal company, requesting the company to "make such study [as] will be appropriate under the circumstances." Several months passed during which the Segal company accumulated the data it believed necessary to make the study. It communicated its findings on October 9, 1969, in a letter to the Fund trustees from Thomas W. Fitzgerald, Mr. McDougall's successor, indicating that the Fund had been adversely affected by the Breyer closing to the sum of \$978,100.

After some requests for clarification made by Donald Mott, a vice-president of Sealtest, Kraftco received a demand for payment of the amount in a letter from Mr. Cohen on behalf of the Fund dated December 22, 1969. The company refused to pay the sum awarded, asserting that the award did not comport with the intent of the parties as expressed in the Breyer agreement. The union trustees thereupon sought relief in the district court.

The case came before Judge Tyler in January, 1971, on a motion for summary judgment by the plaintiffs, who contended that, absent fraud or misconduct on the part of

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the actuary (and none was alleged by Kraftco), the actuary's determination was, in the language of the contract, "final and binding on the parties." Judge Tyler, in an opinion dated February 25, 1971, held that the determination was not final and binding so far as the construction of the language of the contract was concerned and that, to that extent, a determination by an actuary was not equivalent to an arbitrator's award where resolution of contractual ambiguities would generally be beyond judicial review. *Clark v. Kraftco Corp.*, 323 F.Supp. 358 (S.D.N.Y. 1971). He found that because of the nature of the Fund, the language of paragraph 3 was ambiguous and did not provide the actuary with sufficient guidance to apply his expertise to the determination required. But he also concluded that the evidence before him was too fragmentary to enable him to decide just how to resolve the ambiguities in the contract. He therefore remanded the matter to the actuary to make further findings and to conduct new determinations with the formalities which would attend an arbitration proceeding under New York C.P.L.R. § 7601, his intention being that the court would then have before it the relevant facts concerning the actuarial problems involved.

The plaintiffs appealed Judge Tyler's subsequent order of March 24, 1971, which denied their motion for summary judgment, asserting that it amounted to affirmative relief to the defendant in ordering the remand to the actuary. The court of appeals, however, held that the order was nonappealable. *Clark v. Kraftco Corp.*, 447 F.2d 933 (2d Cir. 1971).

Thereafter further determinations were made by Jack Elkin, senior vice-president and chief actuary of the Segal company. The parties have stipulated, and the court finds,

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that these redeterminations were made in full compliance with Judge Tyler's order. The court now has before it the transcript of the testimony given to Mr. Elkin, as well as all exhibits submitted to him.

Mr. Elkin made his new findings in a comprehensive report dated August 27, 1973. He concluded on the basis of the evidence before him that paragraph 3 of the Breyer agreement remained susceptible of multiple interpretations and that he was unable to select the one which, as a matter of actuarial practice, conformed to the intent of the parties. He concluded that three possible determinations could be made reflecting the "impact" of the Breyer closing on the Fund, and he accordingly made three separate calculations, outlining the actuarial assumptions behind each. He labeled these "the original approach," "the Kraftco approach," and "the alternate approach." The court finds that these are the only approaches possible under the agreement. They will be referred to hereafter according to the actuary's designations.

The Fund was established in the early 1950's in accordance with § 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186, as a multiemployer, fixed-contribution fund. The unions and the participating employers, which at the beginning did not include Kraftco, entered into a trust agreement on April 1, 1952, which established a joint industry-labor board of trustees and named the Segal company as sole actuarial consultant to the Fund. Each employer was obligated through its collective bargaining agreement with the unions to contribute to the Fund a specified amount for each hour worked by each of its employees.

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In putting the plan into effect, the trustees first decided what types of benefits would be provided and the conditions under which they would be paid. Then the level of benefits to be paid was established on the basis of actuarial assumptions made by the Segal company concerning anticipated rates of employee withdrawal, death, and retirement, the number of employee hours for which contributions could be expected, and the expected return on the Fund's invested assets. This method of funding, in common use by pension and welfare funds, is known in actuarial practice as the "entry age normal cost" method.

From the start these actuarial assumptions rested on the agreement of the employers and the unions that employee experience was to be pooled. No account was taken of the age and service characteristics or the withdrawal, death, and retirement rates of the employees of each individual employer. Similarly, no effort was made to determine whether the actuarial relationship between the overall contribution rate for the plan and its overall benefit level also held for any particular employer. Consequently, even though all employers contributed the same amount per employee hour, some employers stood at a relative advantage to others in that their employees received benefits in greater proportion than the assumed normal benefit level of the Fund. It was the employers' decision, however, that these relative cost advantages to some should be overlooked in view of the overall cost savings in a multi-employer plan. Any employer dissatisfied with the arrangement was free to withdraw from the Fund at the next round of collective bargaining with the unions.

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When such a fund goes into operation, it necessarily begins its life with a deficit. At the Fund's inception there were employees whose time on the payroll entitled them to benefits, either vested or contingent, but for whom the Fund had not yet received sufficient contributions to cover the resulting liabilities. In conformity with actuarial usage, this deficit was known as the Fund's "past service" or "accrued liability," and to the extent that the Fund's net assets, as they grew over the years, fell short of the liability, the liability was said to be "unfunded." This did not mean that the Fund was actuarially unsound, or that the contributing employers were current debtors in a legal sense. As long as current benefits payable to those actually on pension could be met out of current assets, the Fund was able to carry a large unfunded accrued liability on behalf of active employees without jeopardizing its solvency. Fluctuations between predicted rates and actual rates of employee retirement were then monitored through annual actuarial reviews of the fund, and if the fluctuations remained modest, the unfunded liability could remain outstanding, with minor cost changes absorbed through adjustments in either the contribution rate or the benefit level.<sup>2</sup>

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<sup>2</sup> The initial unfunded accrued liability of such a fund need not remain constant. Since the unfunded accrued liability is a function of two variables, the level of benefits and the total amount of employee prior service credit not funded by current contributions, the unfunded accrued liability can increase if the level of benefits under the plan is increased without a proportionate contribution increase, or if new employees are brought under the plan's coverage for whom a past service credit would be due. Both of these events occurred from time to time in the history of the present Fund, and the unfunded accrued liability increased accordingly.

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The trustees of the Fund thus had a choice whether to amortize the unfunded accrued liability or not and, if they did, at what rate. At the time the Fund was organized they planned to amortize the liability over a period of thirty-five years. Shortly thereafter they decided to carry the unfunded accrued liability as a perpetual deficit, paying only annual interest costs, initially at 2.5% and then at 3%. This, too, was sound funding practice as long as the actuarial predictions underlying the Fund proved roughly constant and correct. A significant departure from these predictions, such as the sudden early withdrawal of a group of employees entitled to benefits and the consequent termination of their employer's contributions, could upset the cost structure of the Fund, either to the extent of making a portion of the unfunded accrued liability a present rather than a contingent deficit, or to the extent of increasing the pro-rata burden on the Fund participants to carry the cost of the unfunded accrued liability. When Kraftco joined the Fund in 1958, the Fund had already been operating for several years without amortizing any of the unfunded accrued liability. Interest was being paid on it at 3%.

The Segal company's original approach, in the words of Mr. Elkin,

was to reconstruct the history of the Newark plant as a participant in the fund. The total contributions made by the employer with respect to Newark employees was measured against the sum of the benefits already paid and the liabilities for future benefits which the plan had incurred or would incur with respect to these employees.

As noted, the first time the Segal company made this calculation, prior to any demand upon Kraftco for payment, it

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concluded that the "contribution deficit" was \$978,100. When the same calculation was made a second time, as part of the redeterminations under Judge Tyler's order, statistical refinements brought the total deficit figure to \$1,110,500.<sup>3</sup>

Both determinations following this approach eliminated the relative advantage which Kraftco had obtained from having participated in the fund instead of having had a separate pension fund of its own. The advantage arose because the age, service, and other characteristics of Kraftco's Newark production employees made them a relatively more costly component of the Fund than those of the average participating employer. Consequently, because of the Fund's ground rules of a fixed contribution rate and pooled employee experience, Kraftco's relative cost advantage had been borne by the other employers. The original approach sought to reimburse the Fund for this burden on the other participants.

The Segal company's second calculation, the Kraftco approach, was made in light of evidence submitted to the Segal company reflecting Kraftco's view of the scope of the Breyer agreement. According to this view the adverse impact on the Fund was the difference between what the

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<sup>3</sup> Mr. Elkin, in his report of August 27, 1973, reaffirmed his belief that the original approach reflected a legitimate study under the terms of the Breyer agreement. However, he acknowledged that he understood Judge Tyler's order of March 24, 1971, to preclude his making an award according to this approach. Judge Tyler, in his opinion of February 25, 1971, had stated that "the [original] Segal determination reflects an egregious departure from past funding practice." 323 F.Supp., at 363. Thus the defendant urges that the original approach, while actuarially possible, is no longer an option for the court to consider, the court being bound by the law of the case. However, since the court finds that the original approach was not the study intended by the parties, the controlling effect of the law of the case on this point becomes moot.

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Fund would lose in contributions from Kraftco for the employees laid off at Newark, and what the Fund would gain by paying present benefits to these employees (which would be less than the benefits potentially payable to them had the plant continued in operation) and also what the Fund would gain in regard to employees whose pension claims would now never vest. This calculation resulted in a contribution deficit of \$135,100.

The Kraftco approach thus ignored the relative cost advantage which had accrued to Kraftco by virtue of its participation in the Fund. It also left out of account the Breyer employees who had retired before the closing date of the Newark plant but who were still on the pension rolls. Under the decision to maintain the unfunded accrued liability as a perpetual deficit and pay only interest on it, part of the contributions aborted by the Newark closing would have been used to defray the cost of these employees' benefits which remained as a future liability on the Fund. By the Kraftco approach, this cost would be picked up by the remaining contributors to the Fund over the future years of the Fund's operation.

In the third and final method of calculation, the alternate approach, the Segal company made a determination which again left out of consideration reimbursement for the cost advantage to Kraftco from the particular age and service characteristics of its Newark employees. But it included reimbursement to the Fund for the added cost occasioned by the loss of Kraftco's anticipated contributions towards the future benefits due all its former employees on the pension rolls, that is, towards maintaining its proportionate share of interest due on the unfunded accrued liability. The contribution deficit determined by this method was \$576,700.

In reaching this figure, Mr. Elkin compared the annual actuarial cost of the plan per employee as of the first val-

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ation date after the Newark closing (in this instance April 30, 1969) with what would have been the actuarial cost if the plant had stayed in operation. These amounts were \$774.71 and \$766.52, respectively, reflecting a cost increase of roughly \$8 a year per employee covered by the plan. He then determined the additional assets which the Fund would have had to acquire as of the closing date, with some adjustments for termination benefits, so that the actuarial cost per employee to the participants in the Fund would have remained at \$766.52. If the sum, \$576,700, had been added to the Fund on the closing date, the Fund would have been in the same actuarial position as it would have been had the Breyer closing, except for the attendant savings, not taken place.

The court finds that the third approach was the one intended by the parties to the Breyer agreement and that by entering into the agreement Kraftco obligated itself to defray any additional cost placed on the Fund participants by the Newark closing, but without forfeiting its own relative cost advantage due to the original decision to pool employee experience.

In reaching this conclusion, the court notes that its finding is based on all the evidence introduced at trial concerning the origins of the Breyer agreement. Part of this evidence had been accepted by the court subject to the plaintiffs' objection that it should not have been received for having been merged into the final agreement of April 25, 1968. The plaintiffs contended that the agreement was broad but unambiguous and so came under the parol evidence rule. However, at the time the matter was before Judge Tyler, the court held that the critical paragraph 3 of the agreement was ambiguous and that, according to the

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scope of the authority granted the actuary, any ambiguity concerning the intent of the parties was for the court to resolve. Under the doctrine of the law of the case applicable in this circuit, Judge Tyler's holding should not now be upset unless it is contrary to the "good sense" of the court. *Zdanok v. Glidden Co.*, 327 F.2d 944, 952 (2d Cir. 1964).

Contrary to finding any grounds which might justify setting aside Judge Tyler's prior holding, the court finds, on the basis of the actuary's report of August 27, 1973, and on the other evidence at trial relating to the testimony before the actuary, that paragraph 3 of the Breyer agreement is ambiguous as Judge Tyler held. Consequently the court may consider evidence extraneous to the agreement which may shed light on the parties' understanding of what the language of the agreement meant. 4 Williston, Contracts §§ 613, 614, 627, 629 (3d ed. 1961). The plaintiffs' objection to the admission of this evidence, on which the court had reserved decision, is therefore overruled.

The evidence adduced at trial, in addition to revealing the nature of the Fund and its actuarial complexities, also revealed that the Breyer agreement, as previously noted, was an offshoot of the area-wide negotiations in the ice cream industry in the spring of 1968. These negotiations took place every three years between the industry bargaining group, the Greater New York and Northern New Jersey Ice Cream Industry Labor Committee, and representatives of the two unions. The 1968 negotiations arose because the existing collective bargaining agreement between the unions and the various employers in the industry group was to expire at midnight, April 30, 1968.

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Under the collective bargaining agreement in force through the spring of 1968, Kraftco was obligated to keep its New York area facilities in operation but, as mentioned, it was desirous of closing its Newark plant. It could have done this without separate negotiations with the unions upon the expiration of the existing collective bargaining agreement. But this was almost certain to engender serious labor disputes in the upcoming area-wide negotiations. As a consequence, in a letter dated January 24, 1968, from V. L. Ashenbrenner, Vice-President of the Breyer Division of Sealtest Foods, to Lawrence McGinley, then President of Local 680, the company communicated its intention to terminate production at Newark and its desire to negotiate an orderly arrangement of any union demands.

In spite of sporadic company pressure over the following months, the union remained indifferent to the requests to negotiate the Breyer closing in advance of the forthcoming area-wide negotiations. However, representatives of both the company and the industry group, in particular Mr. Ashenbrenner, Aaron Solomon, the industry spokesman and co-counsel to the Fund with Mr. Cohen, and Irving Segal, a partner of the Philadelphia law firm of Schnader, Harrison, Segal & Lewis and legal advisor to Sealtest on labor matters, conveyed the general understanding to Mr. McGinley and to Tom Parsonnet, counsel to Local 680, that the company's desire was to terminate only the production of ice cream at Newark (thereafter maintaining a single area production facility at Long Island City, under the jurisdiction of Local 757 in New York) and that the distribution of ice cream in New Jersey under Local 680 would remain unaffected. The company thought this might even result in a net gain of jobs to the New Jersey union, since the company claimed it was prepared to undertake a major advertising campaign for Breyer ice cream in the New York-New Jersey metropolitan area.

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The future of the Breyer plant thus remained unresolved until the area-wide negotiations began in April, 1968, at the Sheraton Motor Inn in New York City. Among the proposals put forward by the union representatives during the course of these negotiations was "proposal 34." This was a proposal to include in the new collective bargaining agreement the following paragraph:

An employer who, by reason of termination of all or any part of its business, or of sale, lease, or for any other reason, terminates the employment of employees in sufficient number to affect the pension fund actuarially shall be obligated to defray the cost of an actuarial study to determine the effect of such terminations and to make such payment or payments to the fund as may be found actuarially required to offset any such effect. In all such cases (except for layoffs or discharges in the ordinary course of business) the Employer shall continue paying the required contributions to the welfare fund until the expiration date of this agreement, and shall continue contributions to the pension fund for employees who would, but for such termination, become entitled to a form of pension benefit prior to the said expiration date, for the same period; provided, however, that such continued contributions shall terminate with respect to any former employee who within that period of time secures employment subject to the provisions of this agreement.

As it turned out, this proposal was never included in the area-wide agreement. Rather, in Mr. Cohen's phrase, it was "withdrawn except as to Breyer's." Prior to the with-

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drawal of the proposal, the company had indicated that it would accept for Breyer whatever the industry group agreed to in regard to proposal 34. This became moot, but in the course of the discussions over the Breyer agreement, attended by the same representatives for Kraftco and the unions who attended the area-wide negotiations, the background of proposal 34 became a critical factor.<sup>4</sup>

This background was an agreement entered into on April 21, 1966, between the same two unions and Swift & Company concerning the closing of a Swift ice cream production facility in Brooklyn, New York, under the jurisdiction of Local 757, and the transfer of its operations to Swift's plant in Woodbridge, New Jersey, under the jurisdiction of Local 680. Distribution procedures remained unchanged in the transfer. A provision was included in that agreement by which Swift agreed to reimburse the industry pension fund (the same Fund involved here) according to the following terms:

1. With respect to the 13 former Brooklyn employees who retired on pension following the termination of operations at Brooklyn, the Company

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<sup>4</sup> Among the representatives present at the area-wide negotiations were the following who were also involved in the Breyer closing: Messrs. Glynn and Mott of Kraftco, Mr. Solomon, the industry spokesman, Mr. Cohen, and Presidents Clark and McGinley of the unions. In addition, although he did not participate in the area-wide negotiations, James J. Leyden of the Schnader, Harrison firm came to New York on April 25th to assist with settling the problem of the Breyer closing. He worked in this connection with Mr. Irving Segal, who had participated in the company's earlier fruitless overtures to Local 680 to arrange the termination of Newark production operations. According to Mr. Leyden's testimony at trial, two other company representatives were also present at the Sheraton Motor Inn, Mr. Ashenbrenner and David Campbell, personnel director of Sealtest.

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shall pay to the Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Trust Fund [sic] (hereinafter referred to as "Pension Fund") a sum of \$8,015.05, which reflects the amount computed by the Unions as necessary to equal three (3) years' contributions for said 13 employees to the Pension Fund.

2. With respect to the 51 employees separated from Brooklyn but who did not retire on pension, the Company shall pay:

(a) To the Pension Fund a sum of \$23,227.13;

(b) To the [Welfare Fund] a sum of \$19,004.01; which sums reflect the amount computed by the Unions as necessary to equal one (1) year's contributions and interest for said 51 employees to said Funds.

3. The Company will pay into the Pension Fund a sum of \$3,201.53 which reflects the amount computed by the Unions as equal to interest that would have been earned if contributions due the said Fund had been paid monthly when due and not delayed during period of escrow.

4. It is recognized that the foregoing amounts set forth in paragraphs 1, 2 and 3 above, are estimates accepted by all parties as final for the purposes of settling the existing controversy and that these amounts are not subject to review or reexamination.

5. Each of the 51 employees separated as a result of the termination of operations of the Brooklyn

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plant, including the 8 persons now employed at Woodbridge, shall be offered employment under the terms of the collective bargaining agreement at Woodbridge.

6. For purposes of computing service of any of the 51 employees who is employed at Woodbridge (but not for seniority) service with the Company shall be determined from the date of employment at Woodbridge.

\* \* \*

In the discussion of proposal 34 in the area-wide negotiations, the understanding of the parties was that proposal 34 would "formalize" the procedures described in the Swift agreement. The following occurred in the discussion of April 9, 1968.

Mr. Cohen: Item 34 is a very interesting proposal.

You remember what we negotiated with the Swift people when they terminated their business in Brooklyn.

We would like to formalize the procedure.

I am not the author of this clause. Tom Personnet is and I am in accord.

This is a non-controversial proposal for the benefit of the Funds [sic] with no gimmicks.

Mr. Solomon: The first part of the clause is general. Suppose an employer goes out of business due to insolvency proceedings.

Mr. Cohen: The employees can be creditors as well as anyone else.

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This proposal establishes a claim for the Fund against an employer who actuarially [sic] bursts the Fund.

Mr. Schacter [an industry group representative]: What effect are we trying to offset?

Mr. Cohen: Any effects determined by the impartial actuary employed by the trustees to the Funds.

If you think the clause needs tightening up, then do so by all means.

You can invite Tom Parsonnet here to talk to us.

Mr. Solomon: Shouldn't we talk to our actuaries?

Mr. Cohen: Yes. As of now, the Segal office has no knowledge of this.

\* \* \*

The clause is meant to be fair. If laid off employees were picked up by someone else there would be no loss.

Mr. Solomon: We don't think any employer should embarrass [sic] the fund, but what about the employer who has paid contributions for all those years it was in business[?]

Mr. Cohen: I agree with you. But there can be a situation with a company signing a contract, qualifying their people and going out of business.

I suppose if you all pay a little more then you'll be paying for the bad guy.

Proposal 34 was discussed again on April 17, 1968:

Mr. Solomon: There were some other things we wanted to talk to [Irving McDougall] about—the

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volumetric formula and Union's proposed No. 34 [sic].

Mr. Mac Dougall [sic]: The only thing that comes to mind is problems under Taft-Hartley.

Mr. Cohen: I don't see a problem. What we have in mind is something like the Swift situation where contributions are not made for the length of time contemplated.

Mr. Solomon: This clause goes beyond what you've mentioned. You contemplate the continuation of contributions until an employee is eligible for retirement.

\* \* \*

Later, on April 26, 1968, the day after the Breyer agreement had been worked out, proposal 34 was "withdrawn except as to Breyer's." Again Kraftco and union representatives involved in the Breyer closing were present during these discussions on the 17th and 26th, but representatives of the Segal company were also present: Mr. McDougall, account executive for the Fund, and a Mr. Mason, otherwise unidentified.

As noted, the Breyer closing itself had been negotiated on April 25, 1968. It had been primarily the work of Mr. Leyden (with the participation of Messrs. Mott and Glynn) on behalf of Kraftco and of Messrs. Cohen, McGinley, and Clark on the part of the unions. At the time, only a handwritten memorandum of agreement had been drawn up by Mr. Leyden,<sup>5</sup> which read in part as follows:

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<sup>5</sup> Mr. Cohen's notes of the April 25th negotiations over the Breyer closing revealed, among other things, that

Leyden presents written summary of agreement \* \* \* SJC [Samuel J. Cohen] says this is acceptable statement of prin-

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2. Sealtest agrees that if the change in Newark Sealtest operation \* \* \* adversely affects the Ice-Cream industry Pension Fund, Sealtest will contribute such sum to the Fund. This actuarial determination will be made with the decision of Martin Segal Co. as final & binding in this regard. Segal & Co.'s study paid for by Sealtest & the Fund.

This language was referred to counsel for the company, in particular Mr. Leyden and Irving Segal of the Schnader, Harrison firm, and the final version of the agreement was reviewed by them, sent to the unions for signature, and finally signed by Kraftco sometime in early June, 1968, although continuing to bear the date of April 25, 1968.

While neither side referred the matter to the Segal company in April despite an intention to do so (nor did

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ciples agreed on. If more precise language is needed we will work it out. All agree that Leyden's handwritten statement will be xeroxed & distributed by Solomon tomorrow.

The statement, signed by Mr. Leyden and also by Mr. Solomon, was thus circulated to the others participating in the area-wide negotiations. As paragraph 5 of the Breyer agreement stated:

During the course of negotiations, the contents of this memorandum of agreement were communicated to the representatives of the employers signatory to the industry area wide collective bargaining settlement agreement with the unions and all parties have agreed that the within memorandum of agreement does not violate the provisions \* \* \* of the industry area wide agreement.

It is clear from the above and from the notes of other participants in the Sheraton Motor Inn negotiations that the Breyer closing was not an isolated event despite the separate agreement. At stake was Local 680's claim to continued representation of Breyer employees, and this had been the critical factor in the delays encountered earlier in the spring in negotiating the closing.

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the company do so later during redrafting), and while there is no evidence that the Swift agreement was ever explicitly discussed in the Breyer negotiations on April 25th, it is nonetheless clear that both sides shared the understanding that the Swift situation provided the model for the Breyer agreement. The plaintiffs deny that this was so, but the claim is contrary to the evidence. The four men principally responsible for the Breyer agreement, Messrs. Leyden, Cohen, McGinley, and Clark, were all familiar with the Swift situation, and the union representatives were, at the same time, putting it forward to the industry group in the form of proposal 34.<sup>6</sup>

Defendant Kraftco has contended that the link of the Breyer agreement to the Swift situation is conclusive that the Kraftco approach was the actuarial study contemplated by the parties. But it is the Segal company's alternate approach which, in the light of the Swift agreement, emerges

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<sup>6</sup> In addition to the evidence reflecting the discussion of proposal 34 in the area-wide negotiations, the following is also noteworthy. According to Mr. Mott's notes of the April 25th Breyer negotiations, Mr. McGinley, President of Local 680, stated that "Parsonnet told him everything Buddy [Irving Segal] told Tom [Parsonnet]." This meant that Mr. Parsonnet, counsel to Local 680, had passed on to Mr. McGinley all the information which Irving Segal had relayed to Mr. Parsonnet between January and April, 1968, concerning Kraftco's plans for the production and distribution of Breyer ice cream in the New York-New Jersey metropolitan area. Furthermore, the Swift agreement, when it was negotiated in 1966, had been worked out primarily by Irving Segal for Swift & Company and had been signed by Messrs. McGinley and Clark for the unions. (Messrs. McGinley and Clark also signed the Breyer agreement for the unions.) And as noted, Mr. Leyden was working in conjunction with Irving Segal.

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as more consistent with the understanding of the parties in April, 1968.<sup>7</sup>

The portions of the Swift agreement quoted earlier indicate that Swift agreed to reimburse the Fund for the adverse effects of the Brooklyn closing only in regard to the period for which contributions had ceased to flow into the fund on behalf of Swift's Brooklyn production employees. Two important differences therefore existed between the Swift situation and that which later developed in regard to Kraftco. First of all, Swift closed its Brooklyn plant in 1965 without prior negotiation with Local 757, and the agreement was to that extent retroactive. Secondly, although Swift production employees were out of work between the closing of the Brooklyn plant and sometime shortly after the signing of the Swift agreement, during which time employer contributions to the Fund on behalf of these employees (plus interest) had been cut off, the

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<sup>7</sup> Even though the Swift situation was central to the parties' intentions as those crystallized during the negotiations in 1968, when the matter of calculating the "impact" of the Breyer closing later came before the Segal company, both in 1969 and again under Judge Tyler's remand, Kraftco failed on both occasions to make any mention of the Swift agreement to the actuary. Nor was the Swift agreement brought to the attention of Judge Tyler. Only in the court proceedings since the Segal company's study of August 27, 1973, has Kraftco urged that the Swift situation is both critical to an understanding of the Breyer agreement and also conclusive of the one study permissible under that agreement, i.e., the Kraftco approach. The latter does not follow from the former, however. Despite Kraftco's claim to the contrary, and its additional claim that the Segal company's alternate approach was never put forward by either side as a possible route for the actuary to follow, it was nonetheless Kraftco's own actuarial consultant, Preston C. Bassett, in his affidavit of December 10, 1970, who had suggested the alternate approach later used by Mr. Elkin.

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agreement specifically provided for the reinstatement of the employees at Swift's Woodbridge plant. Thus it was the parties' understanding that the contributions from the jobs were not permanently lost to the Fund, but only interrupted.

At the same time there is no evidence that any consideration was given to whether or not the Swift company had enjoyed a relative cost advantage due to the pooling of employee experience. The attempt was only to make up to the Fund what had been its net loss, in terms of added costs to the participants, for the interruption in contributions, calculated on the basis of the actuarial assumptions underlying the Fund.

In the Breyer situation, the agreement was designed to define obligations as to the future closing of a Fund participant's plant. Above all, no provision was made in the Breyer agreement to rehire the employees put out of work because of the closing. There was only the provision in paragraph 4 of the agreement that they would be placed at the bottom of the seniority list at Kraftco's Long Island City facility. Contributions to the Fund on behalf of these employees were thus deemed to be permanently lost, and this was the understanding on which the parties and the Segal company later proceeded.

From this evidence the court concludes that the parties to the Breyer agreement did not intend Kraftco to assume liability to the extent that it had benefitted in the past over other contributors to the Fund. But the court also concludes that Kraftco's obligation was more than merely paying the difference between the value of what would have been its contributions to the Fund for its newly retired Newark employees, and the value of the benefits those employees would now receive, without regard to any increase

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in costs thereby placed on Fund participants for all Newark employees on the pension rolls for whom contributions were still required.

The court finds that the parties intended that Kraftco should make up for the positions lost to the Fund's actuarial base. Inasmuch as Kraftco's contributions per employee contained a portion to cover interest on the unfunded accrued liability, and inasmuch as it made no undertaking to rehire its Newark production employees, the loss of the Newark positions resulted in an increase in the cost per employee of maintaining the existing benefit level of the Fund. The court concludes that the amount of this loss (as of the closing), over the period it would be sustained, was to be paid by Kraftco to the Fund.

Further evidence adduced at trial confirms that this was the intent of the parties. While it is true, as previously mentioned, that the Breyer agreement itself was not reviewed by an actuarial consultant either during its negotiation or prior to its final signing, an actuarial study dated "4/5/68" had been done for Kraftco by Peat, Marwick, Mitchell & Company outlining the savings of the closing relative to pension and welfare costs. This study of the "Breyer Ice Cream Division—Newark Plan \* \* \* as of May 1, 1968," indicated that the company's "Estimated termination liabilities \* \* \* For Retirement Benefits" was \$422,000, and it contrasted this liability with the "Estimated costs on a continuing basis [of] Past Service Liability" of \$714,000. Thus the company's own estimates, even though they reflected a net saving of \$292,000 in pension costs, predicted a liability for pension benefits on closing in an amount close to the Segal company's alternate approach figure of \$576,700.

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Furthermore, in the area-wide collective bargaining agreement of May 1, 1968, in which representatives of the Segal company had participated, no change was made in the funding policy of the Fund. Interest would continue to be paid on the unfunded accrued liability and no amortization of the liability was contemplated.

This result would have been inconsistent with the Segal company's original approach. Had that approach been the one intended by the parties, its effect would have been either to fund part of the unfunded accrued liability, or to increase the benefits payable under the plan without any other compensating adjustment, or to reduce the Fund participants' costs per employee, or some combination of these. But neither the April area-wide negotiations nor the May 1st agreement give any indication that the industry and union representatives present, aware as they were of the Breyer agreement, or the representatives of the Segal company had any such result in mind. Their actions, rather, are consistent with the assumption that the Breyer agreement would preserve the status quo of the Fund, an assumption confirmed by the ensuing annual actuarial review of the Fund prepared by the Segal company.

Finally, it is to be remembered that those participating in the negotiation of the Breyer agreement, in addition to having the Swift situation in mind, were also familiar with Article 1, section 1, of the trust agreement of April 1, 1952, which set up the Fund. That section, included in subsequent versions of the agreement, contained a clause which allowed new participants to join the Fund "provided that the extension of coverage to the employees of such employer will not adversely affect the soundness of the Fund as determined by the Fund's Actuaries." According to Mr. Elkin,

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the question [addressed by this clause] is will the average cost for the fund as a whole go up or will it actually be decreased if this new employer comes in with its employees and without a fund corresponding to the fund that has accumulated so far.

Defendant Kraftco's expert witness on the actuarial aspects of the case, Preston C. Bassett of the consulting firm of Towers, Perrin, Forster & Crosby, Inc., discussed this as follows:

\* \* \* [At] least one meaning other than the one chosen by the Segal Company [in the original approach] could have been attached to the words used in the Breyer Agreement to define the study intended. \* \* \* Mr. Elkin has described in his deposition the kind of study he would make under [Article 1, section 1, of the trust agreement]. Using the normal cost techniques employed by the Segal Company in its Annual Actuarial Reviews, Mr. Elkin says he would calculate the normal cost of the Fund plus interest on the unfunded accrued liability, first with the new employees excluded, and then with the new employees included. The difference in the costs so calculated would be a measure of the adverse effect of the new entrant's joining the plan.

\* \* \* The only reason why an actuary would apply one method to study the impact of the entry of a new Employer and use another when asked to determine the impact of the exit of an Employer is that different approaches were intended by the parties or required in the circumstances.

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\* \* \* The [original] approach taken by the Segal Company with respect to the Breyer closing is radically different from the approach which Mr. Elkin said he would use in response to the "adversely affect" language in the Agreement and Declaration of Trust. In the absence of evidence that the parties intended such a result, I can see no basis for construing such similar language in the Breyer Agreement in so different a fashion.

In light of all the evidence, therefore, the court concludes that the Segal company's alternate approach was the determination intended by the parties to assess the "impact" on the Fund stemming from the termination of Kraftco's Newark production operations.

Accordingly, the plaintiffs are entitled to recover from defendant Kraftco the sum of \$576,700 on behalf of the Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Fund,<sup>8</sup> together with interest thereon from

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<sup>8</sup> Kraftco has contended that in the event the court upholds the Segal company's alternate determination, then "the Court has the power to review [the] calculation for reasonable correctness." It has also contended that "taken on [its] own assumptions, there are errors in [the] calculations of such nature that the Court should correct them." The court, however, concludes that pursuant to both the Breyer agreement and Judge Tyler's opinion of February 25, 1971, 323 F.Supp. 358, as well as the court's letter of October 11, 1973, to counsel for the parties, matters of actuarial expertise are not open to judicial review unless there has been a showing of fraud or personal misconduct (and neither has been alleged), or unless the court has been persuaded that the actuary used a method of evaluation inconsistent with the Breyer agreement or beyond the scope of the agreement. Since the court is persuaded otherwise, the court concludes that the actuary's determination according to the alternate approach, consistent as it is with the court's construction of the language of the agreement, is "final and binding on the parties."

*Opinion and OrderAppealed From*  
*Dated February 19, 1974*

November 2, 1968, the date production was terminated at the Newark facility, until the date of judgment under this decision, interest thereafter to be computed according to 28 U.S.C. sec. 1961.<sup>9</sup> In light of the complexity of the case, as well as the plaintiffs' previous unsuccessful appeal of Judge Tyler's order, neither costs nor attorneys' fees shall be recovered by either side.

The foregoing constitutes the court's findings of fact and conclusions of law in accordance with Fed.R.Civ.P., Rule 52(a). Judgment for the plaintiffs shall be entered accordingly.

SO ORDERED.

/s/ J. EDWARD LUMBARD  
J. Edward Lumbard  
Circuit Judge  
(sitting by designation)

Dated: February 19th, 1974

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<sup>9</sup> The court holds that prejudgment interest is to be recovered in this action. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). Since there is no rate of interest prescribed by federal law, which controls here (see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)), and since allowing prejudgment interest does not conflict with either state or federal policy, the court concludes it is appropriate to look to New York state law to determine the rate of prejudgment interest. *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941); *Collier v. Granger*, 258 F.Supp. 717 (S.D.N.Y. 1966). Therefore, in accordance with New York C.P.L.R. sections 5001 and 5004, prejudgment interest shall be calculated at 7 1/4% per annum from November 2, 1968, through February 15, 1969; at 7 1/2% per annum from February 16, 1969, through August 31, 1972; and at 6% per annum from September 1, 1972, to the date of this decision. See *Gelco Builders and Burjay Const. Corp. v. Simpson Factors Corp.*, 301 N.Y.S.2d 728 (Sup. Ct., N.Y. Co., 1969). Interest, if any, from date of decision to date of judgment shall be determined according to New York C.P.L.R. sec. 5002.

**Notice of Motion of Defendant Kraftco Corporation  
Dated March 4, 1974 Pursuant to F.R. Civ. P. 52(b)  
and 59(a) and (e)**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246 (J.E.L.)

Judgment No. 74,197

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[SAME TITLE]

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S I R S :

PLEASE TAKE NOTICE that, upon the Opinion and Order of this Court (Honorable J. Edward Lumbard) filed February 20, 1974, and the Judgment entered pursuant thereto on February 22, 1974, and upon all prior proceedings in this action, the undersigned will move this Court (Honorable J. Edward Lumbard) at the United States Courthouse, Foley Square, New York, New York on the 14th day of March, 1974 at 10:00 A.M. o'clock, or as soon thereafter as counsel can be heard, for an order pursuant to Rules 52 (b) and 59 (a) and (e) of the Federal Rules of Civil Procedure, opening the Judgment entered herein, amending its findings of fact and conclusions of law and amending the Judgment accordingly or, in the alternative, granting a new trial in this action, as follows:

(1) amendment of the findings, conclusions and Judgment to hold defendant Kraftco Corporation liable in the principal sum of \$135,100 rather than \$576,700 on the ground that the distinction found between the

*Notice of Motion of Defendant Kraftco Corporation  
Dated March 4, 1974 Pursuant to F.R. Civ. P. 52(b)  
and 59(a) and (e)*

Swift Agreement (Exhibit J) and the Breyer Agreement (Exhibit 15) and relied upon to find Kraftco liable for \$576,700 does not in fact exist, and

(2) in the alternative, and on the assumption that the Court correctly construed the intent of the parties to the Breyer Agreement, a new trial on the ground that the Actuary acted inconsistently with such intent and outside the scope of his actuarial expertise by including in his calculations employment positions that were part of the Breyer-Newark distribution operations which operations were not discontinued on November 2, 1968 but merely relocated to Edison, New Jersey,

and for such other and further relief as to this Court shall seem just and proper.

Dated: New York, New York  
March 4, 1974

Yours, etc.

SULLIVAN & CROMWELL  
By John F. Cannon  
(A Member of the Firm)  
Attorneys for Defendant  
Kraftco Corporation,  
48 Wall Street,  
New York, New York 10005  
(212) 952-8100

To: Cohen, Weiss & Simon  
Solomon, Rosenbaum & Goodman  
Schachter & Wiseman

249a

**Order Denying Motion Under F.R. Civ. P.  
52(b) and 59(a) and (e)**

The motion is denied

**J. EDWARD LUMBARD  
U.S.C.J.  
Sitting by designation**

March 28, 1974

**Judgment Appealed From, Dated  
February 22, 1974**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

70 Civil 1246 (JEL)

Judgment No. 74,197

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[SAME TITLE]

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The issues in the above entitled action having been brought on regularly for trial before the Honorable J. Edward Lumbard, United States Circuit Judge, sitting by designation, on December 5 and 6, 1973, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on February 20, 1974, having handed down its opinion and order constituting its findings of fact and conclusions of law directing that judgment be entered in favor of the plaintiffs, it is,

ORDERED, ADJUDGED AND DECREED, that plaintiffs, Peter F. Clark, et al., have judgment against the defendant, KRAFTCO CORPORATION, in the amount of \$576,700.00, with pre-judgment interest at 7 1/4% per annum from 11/2/68 through 2/15/69; at 7 1/2% per annum from 2/16/69 through 8/31/72; and at 6% per annum from 9/1/72 to date of judgment, without costs nor attorneys' fees for either party.

Dated: New York, N. Y.  
February 22, 1974

RAYMOND F. BURGHARDT  
Clerk

**Notice of Appeal**

**(Defendant Kraftco Corporation)**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246 (J.E.L.)

—————  
[SAME TITLE]  
—————

PLEASE TAKE NOTICE that defendant Kraftco Corporation hereby appeals to the United States Court of Appeals for the Second Circuit from the Opinion and Order of the District Court, dated February 19, 1974, the Judgment entered thereon, dated February 22, 1974, and the order dated March 28, 1974 which denied said defendant's motion pursuant to Fed.R.Civ.P. 52(b) and 59(a) and (e), to amend the findings of the District Court and the Judgment, or for a new trial.

Dated: New York, N. Y.  
April 15, 1974

Yours, etc.,

SULLIVAN & CROMWELL  
By JOHN F. CANNON  
(A Member of the Firm)  
Attorneys for Defendant Kraftco  
Corporation  
48 Wall Street,  
New York, N. Y. 10005  
(212) 952-8100

*Notice of Appeal*

To:

COHEN, WEISS AND SIMON,  
605 Third Avenue,  
New York, N. Y. 10016.

SOLOMON, ROSENBAUM & GOODMAN,  
1450 Broadway,  
New York, N. Y. 10018.

SCHACHTER & WISEMAN,  
331 Madison Avenue,  
New York, N. Y. 10017.

**Notice of Appeal**

**(Plaintiffs)**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 1246 (J.E.L.)

—————  
[SAME TITLE]  
—————

PLEASE TAKE NOTICE that the plaintiffs herein hereby appeal to the United States Court of Appeals for the Second Circuit from the Opinion and Order of the District Court, dated February 19, 1974, and the Judgment entered thereon, dated February 22, 1974.

Dated: New York, N. Y.  
April 26, 1974

Yours, etc.,

COHEN, WEISS AND SIMON  
By SAMUEL J. COHEN  
(A Member of the Firm)  
Attorneys for Plaintiffs  
605 Third Avenue  
New York, New York 10016  
Tele. No. (212) 682-6077

254a.

*Notice of Appeal*

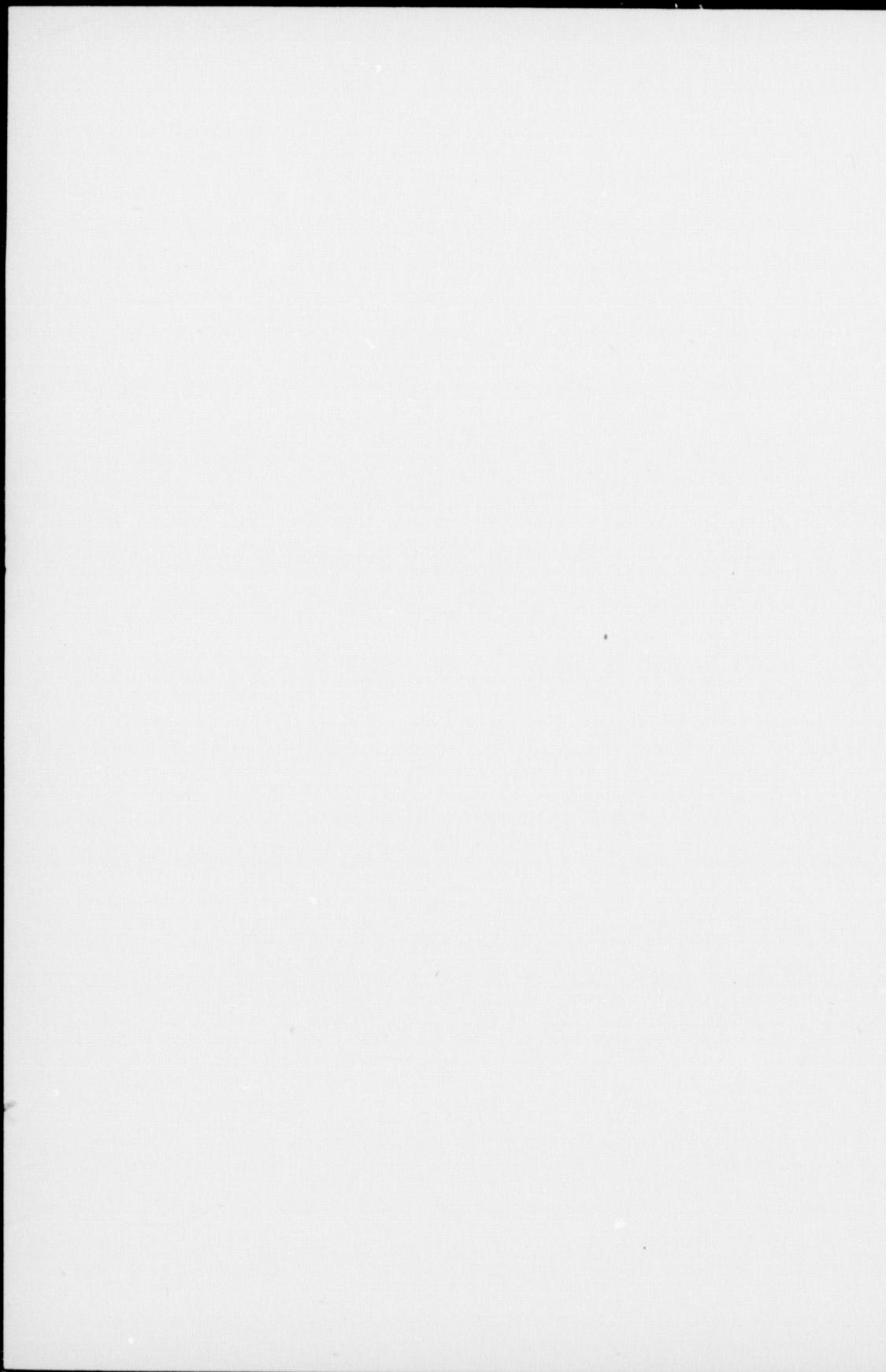
To:

SULLIVAN & CROMWELL  
48 Wall Street  
New York, New York 10005

SOLOMON, ROSENBAUM & GOODMAN  
1450 Broadway  
New York, New York 10018

SCHACHTER & WISEMAN  
331 Madison Avenue  
New York, New York 10017

## **TRIAL EXHIBITS**



**Plaintiff's Exhibit 1**

**A G R E E M E N T**

**New York City, Northern New Jersey and  
Southern New York State Area-Wide  
Union Agreement in the  
Ice Cream Industry**

of the

**ICE CREAM DRIVERS  
AND  
EMPLOYEES UNION  
Local 757**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS,  
WAREHOUSEMEN AND HELPERS  
OF AMERICA  
A. F. of L.**

**265 West 14th Street, New York City**

**EXPIRES APRIL 30, 1952**

**Telephone: CHelsea 2-4977**

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*Plaintiff's Exhibit 1*

**EXHIBIT D**

1. A pension and welfare program shall be instituted which shall be financed by Company contributions during the term of the collective bargaining agreement of ten cents per straight-time hour actually paid for up to a maximum of forty hours per week and not to exceed 2,080 hours per work year for each employee covered by the collective bargaining agreement.
2. The Company makes no commitment with respect to the level of benefits which shall be provided by the program, and the total expense to be incurred by the Company with regards to the pension and welfare program shall be the ten cents per hour contribution specified above.
3. The allocation of the total ten cent contribution between the pension and the welfare program shall be determined subsequently by the below mentioned joint committee of the parties.
4. The Company contributions to the program shall accrue as of 12:01 A.M., May 1, 1951 and shall be subject to ruling by the Wage

*Plaintiff's Exhibit 1*

Stabilization Board that prior approval thereof is not required or to approval by the Wage Stabilization Board, and shall be subject to all other conditions set forth in this Exhibit D.

5. The pension and welfare program contemplated herein shall be a uniform program in which all employers in the Ice Cream Industry signing contracts with Locals 757, 680 and 338, within the term of this agreement shall participate.

6. If the Company has an employee welfare or pension program covering employees affected by this agreement, it shall maintain such programs with respect to such employees, until the new program contemplated by this agreement is approved and becomes operative, or until December 31, 1951, whichever date is earlier. If the Company is contributing to such presently operative programs it shall not, prior to December 31, 1951, claim a credit, in the amount of such contributions, against the required ten cent contribution, unless a welfare or pension program or appropriate portion thereof becomes operative sooner. Should the new program not be in operation by December 31, 1951, the below mentioned joint committee shall have the right to extend the time of the continuance of present program or appropriate portion thereof and postpone the above referred to credit, but no later than midnight April 30, 1952.

7. Compulsory retirement, at age 68 after July 1, 1952 and at age 70 prior to July 1, 1952 is recognized as an obligatory feature of the

*Plaintiff's Exhibit 1*

program. Consideration regarding deferred retirement shall be given where a reasonably adequate retirement benefit is not available to the employee at the normal retirement age. In determining the adequacy of the retirement payments to an individual, Social Security benefits shall be included.

8. No program shall be instituted unless it qualifies for approval by the United States Treasury Department so that the Company contributions to the program shall be tax deductible.

9. The Company shall not claim a reduction in the level of its contributions by virtue of future liberalization of the Federal Social Security program.

10. The problem of providing retirement benefits for individuals subject to all conditions set forth in this Exhibit D between May 1, 1951 and the operative date of the new program is recognized.

11. The welfare benefits under this program shall meet the requirements of state statutes, in the respective states affected, pertaining to the payment of weekly disability or sickness benefits. The Company shall not be required to contribute to the support of programs required by such statutes in addition to the private program herein contemplated.

12. All expenses incidental to the institution, promulgation or administration of the pension and welfare program are to be paid

*Plaintiff's Exhibit 1*

out of the moneys of said pension and welfare fund.

13. (a) The Joint Committee, consisting of six Employer committeemen and six Union committeemen, shall be:

(1) R. E. Shook, (2) Alfred Ricciardi, (3) William H. Hornung, (4) C. M. McClean, (5) William Scheerer, (6) Attilio Ricciardi, (7) George Gray, (8) Joseph P. Heffernan, (9) John H. Webster, (10) Lawrence W. McGinley, (11) William F. Kennedy, (12) John A. Manchester. This Joint Committee shall formulate, within the framework of this Agreement, the specific and detailed provisions of the pension and welfare program.

(b) All decisions made and all actions taken by the Joint Committee shall be only upon two affirmative votes, one vote of which shall be cast pursuant to the desires of a majority of the Union Committeemen present, and one vote of which shall be cast pursuant to the desires of a majority (at least four of the six) of the Employer Committeemen. In the event of inability of the Joint Committee to agree upon matters necessary to the institution of the pension and welfare programs, the disputed issue shall be decided through arbitration pursuant to the arbitration provisions of this agreement, except that the Mediation Board of the State of New York shall be deemed substituted for the New Jersey State Board of Mediation in all cases, the scope of such arbitration not to infringe upon the area of basic

*Plaintiff's Exhibit 1*

provisions herein agreed upon or change or modify such basic provisions.

(c) Should an employer committeeman be unable to serve or resign a replacement shall be designated as follows:

R. E. Shook, by Breyer Ice Cream Co., Inc., Breyer Ice Cream Company, Hydox Ice Cream Co., Inc., Consolidated Dairy Products Co., Inc., and Castle's Ice Cream Co.; Alfred Ricciardi, by Pioneer Division of Borden Co., The Ricciardi Company, Inc., Fussell Ice Cream Co., Inc.; William H. Hornung, by Abbotts Dairies, Inc.; C. M. McClean, by Philadelphia Dairy Products Company; William Scheerer, by Newark Milk and Cream Company, Inc., Town Talk Ice Cream Company, Mell-O-Made Ice Cream Company, Inc., and Renee Ice Cream Company; Attilio Ricciardi, by Blue Ribbon Ice Cream Company, Louis Sherry Ice Cream Company and Lucy Ricciardi, Inc. Removal or substitution shall be in the same manner.

(d) Should a Union committeeman be unable to serve or resign, a replacement shall be designated as follows: George Gray and Joseph P. Heffernan by Local 757; John H. Webster and Lawrence W. McGinley by Local 680; William F. Kennedy and John A. Manchester by Local 338. Removal or substitution shall be in the same manner.

(e) Pending replacement of a Union or a Company committeeman the remaining members of the joint committee shall have full power to act in the manner provided above.

*Plaintiff's Exhibit 1*

14. (a) The Company shall as soon as possible with due regard for bookkeeping necessities, but in any event no later than July 15, 1951, pay over to the depositor, hereinafter to be named all monies due from May 1, 1951 to and including the last payroll date in the month of June, 1951. Until the Pension and Welfare Program provided for herein has been formally instituted, the monies hereafter due under the foregoing provisions shall be paid over monthly to the depository on the fifteenth day of each month covering all payrolls ended during the preceding calendar months.

(b) The depository shall be the Central Hanover Bank & Trust Co., 70 Broadway, New York, New York, provided a satisfactory interest rate is granted. The sole function of said depository shall be to receive and hold the moneys deposited in escrow pursuant to the provisions of paragraph 16 of this Exhibit D, to the credit of the Pension and Welfare Program and to pay out said moneys to the Pension and Welfare Program when it has been formally instituted in accordance with this Exhibit D. The depository shall make appropriate transfer of such moneys, together with earned income, if any, to the uses and purposes of the Pension and Welfare Program when formally instituted upon the joint order of any two of the following persons, one of whom must be R. E. Shook or Alfred Ricciardi of the Employer Committeemen, and the other of whom must be George Gray or Lawrence W. McGinley of the Union Committeemen.

*Plaintiff's Exhibit 1*

(c) The Joint Committee named hereinabove shall forthwith arrange the necessary clerical and record keeping details incidental to the payments to be made to the Program, and all other details necessary to the prompt and orderly collection of the moneys due.

(d) The failure of the Company to pay moneys due under the Pension and Welfare Program shall be a violation of the collective bargaining agreement. Non-payment by any Company or Companies of any moneys now or hereafter due shall not relieve the Company from its obligation to make the payments required hereunder. In addition to any other remedies to which the parties may be entitled, when the Company is in default for ten (10) working days it shall be obligated to pay six (6%) percent interest on the moneys due to the Pension and Welfare Program from the date when payment was due to the date when payment is made. All moneys due, together with interest as aforesaid shall be deemed trust funds.

(e) In addition to any other enforcement remedies which may be provided therein, it is agreed that when the Pension and Welfare Program has been formally instituted, the trustees thereof shall be authorized and empowered to take whatever proceedings may be necessary for enforcement thereof, including any remedies which would be generally available to the parties for enforcement of the collective bargaining agreement.

*Plaintiff's Exhibit I*

15. The foregoing provisions of this Exhibit D, which constitute a statement of the principles of the understanding and agreement of the parties with respect to the Pension and Welfare Program shall be superseded by a detailed written agreement covering the subject matter as soon as the same has been prepared. When completed, such detailed statement shall immediately be substituted for the foregoing, and thereafter shall constitute Exhibit D of the collective bargaining agreement as if annexed hereto and agreed to by the parties hereto.

16. The above mentioned Company contributions shall be held in escrow by the Joint Committee above named, and deposited in the depository above named, until such ruling or approval as above provided for is obtained from the Wage Stabilization Board. Upon the issuance of such ruling or approval and the execution of the formal trust agreement as above provided, said funds shall immediately be turned over to the Trustees for the purposes of the Pension and Welfare Trusts subject to the provisions of this agreement. In no event shall the aforesaid contributions be returnable unless the above mentioned ruling or approval is not obtained during the term of the collective bargaining contract in which event the said contributions shall be returned to the Companies making the same less their proportionate share of any expense incurred by the Joint Committee, if any.

**Plaintiff's Exhibit 4**

**ICE CREAM INDUSTRY**

**AGREEMENT**

of the

**MILK DRIVERS**

and

**DAIRY EMPLOYEES**

**UNION**

**LOCAL 680**

**International Brotherhood of Teamsters,  
Chauffeurs, Warehousemen and  
Helpers of America**

**EXPIRES, MIDNIGHT, APRIL 30, 1968**

**535 HIGH STREET, NEWARK, N. J.**

**Telephone: MArket 2-4103**

*Plaintiff's Exhibit 4*

AGREEMENT made as of this first day of May, 1965 between MILK DRIVERS and DAIRY EMPLOYEES UNION LOCAL 680, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, hereinafter called the "Union,"

and

.....  
(name)

.....  
(address)

hereinafter called the "Company," wherein it is mutually agreed as follows:

1. This agreement shall be effective as of May 1st, 1965, and shall continue in effect until midnight on April 30th, 1968. During such period there shall be no reopening or negotiation with respect to any term or condition of the agreement, except as otherwise provided herein.

Ninety (90) days before May 1, 1968, either party desiring to terminate or modify this contract shall give notice, in writing, to such effect, and thereafter shall serve a written copy of its demands no later than sixty (60) days before May 1, 1968. All notices shall be sent by certified mail addressed to the Company at the above address and the Union at

*Plaintiff's Exhibit 4*

its headquarters at 535 High Street, Newark, N. J. In the event notice of termination or modification is not sent in accordance with the foregoing, the contract shall continue from year to year after the expiration date until terminated or modified in the manner herein provided.

This Agreement shall constitute the entire understanding between the parties hereto and shall supersede all prior agreements between them.

2. (a) This Agreement shall cover all employees of the Company except .....

.....  
and except outside salesmen, canvassers, merchandise men, professional employees, engineers, supervisors, as defined in the Labor-Management Relations Act, and all employees who are presently covered by contracts with other unions.

(b) The Company recognizes the Union as the exclusive bargaining representative of the employees comprising the unit described above employed by the Company at the following location or locations:

.....  
.....  
.....

*Plaintiff's Exhibit 4*

and at such other location to which the Company's plant may be moved.

(c) All routes now served by employees covered by this contract shall continue to be served by employees covered by this contract while the routes exist.

(d) The Company agrees not to contract out work customarily performed by its employees. However, nothing herein contained shall prevent the Company from continuing to have work performed outside of the Company which prior to April 30, 1962 it customarily has had performed outside the Company.

In order to protect the job opportunities and labor standards of all employees in the industry-wide collective bargaining unit and at the same time provide for greater flexibility of the companies covered by this Agreement, the Company will not purchase or obtain products from any source including any other division or plant of the Company except from an employer in the Metropolitan Area as defined in this Agreement providing its employees with wages, hours and benefits and all other terms and conditions of employment equal to or better than the requirements of this Agreement. It is further agreed that the Company will not purchase or obtain products from any source whatever including any other division or plant of the Company if any permanent production employee who is ac-

*Plaintiff's Exhibit 4*

tively employed on May 1, 1965 or thereafter is on lay-off from the production department and has been on lay-off for a period of one (1) year or less at the time of the purchase of the product.

The term "actively employed" for the purposes of this provision only, shall include employees who on May 1, 1965 or thereafter, are on:

- (a) Leave of absence
- (b) Vacation
- (c) Absence due to temporary disability caused by accident or illness.
- (d) Jury duty
- (e) Mourning leave
- (f) Suspension
- (g) It shall also include permanent production employees on lay-off as of May 1, 1965 who are thereafter recalled within the period the employee has recall rights.

The term "permanent employee," for the purpose of this provision only, shall mean employees who have attained twelve (12) continuous months of service.

The limitations with respect to the purchase of product while permanent production employees are on lay-off, as provided above, shall not apply to any of the following situations:

*Plaintiff's Exhibit 4*

(a) The purchase of novelty items (product sold in individual containers of less than one-half (1/2) pint regardless of the multiples in which it is sold) which the Company is not licensed to manufacture and for which a license is required, such as, Eskimo Pie, Good Humor, Captain Crunch, Bon Bons, Sunkist Pops and Welch Pops. It is understood that the foregoing enumeration is for the purposes of illustration only.

(b) The purchase of product not manufactured or packaged by the Company on May 1, 1965 or for any period during the twelve (12) months prior thereto.

(c) The purchase of product during emergencies such as plant breakdowns, fires, floods or acts of God.

(d) The purchase of a new product not previously manufactured or packaged which the Company manufactures or packages for a trial period of one (1) year or less and which it discontinues.

The provisions of this Section 2(d) shall not be applicable to the purchase or obtaining of product by the companies listed in Schedule "A" which do not as of the effective date of this Agreement, manufacture ice cream products in the Metropolitan Area as defined in this Agreement, provided this exception shall not be used as a means for supplying other companies in order to circumvent this provision.

*Plaintiff's Exhibit 4*

This Section 2(d) shall not apply to the importing of new products for a trial period not to exceed six (6) months, but such period may be extended by mutual agreement; nor shall it apply to the importing of products during emergencies such as plant breakdowns, fires, floods or acts of God.

In the event of a substantial loss of business making it impossible for a company to comply with the limitations of Section 2(d) with respect to the purchase of products while permanent production employees are on lay-off, the Union and the Company shall meet to discuss the matter and attempt to arrive at an adjustment by mutual agreement, but in the event of disagreement such matter shall not be subject to arbitration hereunder, except with the agreement of the Union.

(e) The Company agrees for the term of this Agreement not to remove its manufacturing operations from the area of Local 680 and to continue to manufacture within the area of Local 680, and the Company, including any affiliates or subsidiaries, agrees that it shall not establish or operate a plant for production of ice cream or frozen dessert products outside of the Local 680 area for sale or distribution of such products in the Metropolitan Area; however, nothing herein shall restrict a company which formerly manufactured under contract with Local 757 or 680 from resuming such manufacturing under contract with said Local for distribution in its area.

*Plaintiff's Exhibit 4*

The area of Local 680 shall be the Counties of Union, Essex, Bergen, Hudson, Passaic, Middlesex, Ocean, Somerset, Morris, Monmouth, Hunterdon, Sussex, and Warren, in the State of New Jersey.

(f) Platform deliveries to jobbers, vending machine operators and special accounts shall be permitted, provided that such deliveries shall be limited to the same number of jobbers, vending machine operators and special accounts (to be determined by the number of trucks), presently receiving such deliveries; and provided further that a written statement listing such jobbers, vending machine operators and special accounts was signed by the Company and forwarded to the Union on or before May 15, 1952. Any Company not previously a party to an agreement with the Union, shall sign and forward such list to the Union within 30 days from the date such Company executes this Agreement. Deliveries to other jobbers, vending machine operators and special accounts not served by commission drivers as regular customers on regular routes shall be made to their regularly established premises by hourly paid drivers covered by this Agreement.

All loading and unloading work in connection with platform deliveries shall be performed by employees covered by this Agreement, except that listed jobbers, vending machine operators and special accounts may remove ice cream from the platform and load the same into their trucks.

*Plaintiff's Exhibit 4*

19. The Metropolitan Area as used in this Agreement shall consist of: the City of New York, the Counties of Nassau, Suffolk, Westchester and Rockland in the State of New York, and the Counties of Union, Essex, Bergen, Hudson, Passaic, Middlesex, Ocean, Somerset, Morris, Monmouth, Hunterdon, Sussex and Warren, in the State of New Jersey.

Dated April 30, 1965  
Milk Drivers and Dairy Employees  
Union Local 680, affiliated with the  
International Brotherhood of Team-  
sters, Chauffeurs, Warehousemen and  
Helpers of America

By: .....

By: .....

Name of Company

*Plaintiff's Exhibit 4*

area in which a delivery is made, the Company reserving the right to verify the necessity for the payment by the employee of a parking meter fee.

31. **Change in Reporting Time:** The Company will give one (1) week's notice of a change in the starting time or times of a permanent or season shift. Changes in the starting time of individual employees or groups of employees will be communicated to such employees as far in advance as possible.

32. To meet its requirements for trailer drivers, the Company shall provide instruction for its employees at its own cost but without pay and outside of working hours.

**EXHIBIT C**

**SENIORITY**

1. Seniority shall prevail within each department within the plant for all purposes except layoff and rehire.

2. When a layoff becomes necessary, the junior employee in the craft group (department) in the order of plant seniority in any capacity covered by this agreement shall be the employee to be laid off.

3. Rehires shall be in the reverse order of layoffs. Employees who have one year or less of accumulated service with the Company shall cease to have rehire rights with the Company

*Plaintiff's Exhibit 4*

after one year of continuous layoff and other employees who have more than one year of accumulated service with the Company shall cease to have rehire rights with the Company after two years of continuous layoff. Employees laid off through no fault of their own shall in the order of their seniority for the period of time provided in this paragraph be called to fill vacancies as they occur and must report for work within forty-eight (48) hours after notification to the employee by the Company.

4. When leaving a craft group (department) in which any employee has been employed for a different craft group (department), seniority therein shall begin for all purposes except layoff and rehiring.

5. Layoff for more than the period of time provided in paragraph 3 of this Exhibit C, resignation or discharge shall constitute a break in seniority. Seniority will start anew upon re-employment. When employees are laid off and rehired within the period of time provided by paragraph 3 of this Exhibit C, they shall be given continued seniority.

6. The following shall be considered craft groups (department) for purposes of seniority:

(a) Route drivers, platform men, checkers and traffic boxmen.

*Plaintiff's Exhibit 4*

ployed by the Company at least one year in one department before he or she can exercise seniority to bid for vacancies.

11. In all consolidation of branches or plants of one company covered by contract with the same local union, seniority shall be merged. If the Company acquires all or any part of an ice cream business and merges or consolidates or otherwise combines the same with its own business, then the employees of the business so taken over, if they have been members of the Union for more than six (6) months prior to the date of such acquisition, shall enjoy seniority on the basis of the period of employment in the business acquired. Where the business so acquired has non-union employees, or employees who have been members of the Union for less than six (6) months, the question of seniority for the employees of the business acquired is to be agreed upon between the Union and the Company party to this agreement.

**EXHIBIT D****PENSION & WELFARE FUNDS**

1. (a) Except as otherwise provided for herein, the uniform pension and welfare pro-

*Plaintiff's Exhibit 4*

gram previously instituted and the Employer contributions thereto shall be continued during the term of this Agreement.

Effective May 1, 1965, Employer contributions to the Pension Fund shall be at the rate of \$2.50 per day for each day paid for, up to a maximum of five days per week. Effective May 1, 1965, the normal and 35-year pension benefits shall be increased to \$200 per month, and other benefits except disability shall be increased proportionately, and a 10-year guarantee for widows shall be provided.

Effective May 1, 1965, Employer contributions to the Welfare Fund shall be at the rate of \$1.77 per day for each day paid for, up to a maximum of five days per week. The increased Welfare Fund contributions shall be utilized to provide an increase in life insurance from \$5,000 to \$10,000, to provide a blood benefit and to provide a reserve factor.

Effective May 1, 1965, the Employer shall contribute to the Pension Fund 16¢ per day for each day paid for up to a maximum of five days per week to provide termination benefits.

The said Pension and Welfare Programs shall be administered under the existing Trust Agreement, with appropriate amendments, which said Trust Agreement, with appropriate amendments, shall continue during the

*Plaintiff's Exhibit 4*

term hereof. Upon request of the Union or of the Trustees the Employer shall promptly execute a copy of the Trust Agreement.

**EXHIBIT E**  
**SEVERANCE PAY**

Any permanent employee, who is permanently laid off through no fault of his own for lack of work or other economic cause after fifteen (15) years of continuous service with his employer shall be eligible for severance pay at the rate of one day of pay for each year of such service.

A day's pay for the purpose of this provision shall, in the case of an hourly paid employee, be computed at his current straight time hourly rate of pay, and in the case of a route driver paid on a daily rate plus commission shall be computed on the basis of 8 hours of straight time at the hourly rate of transportation drivers employed at the hourly rate, and in the case of any other daily paid employee, shall be computed at his current straight time daily rate.

Severance payments shall be in addition to any payments to which the employee may be entitled under this Agreement, and shall be paid in weekly installments commencing one week after layoff, it being the intention of the parties that an employee shall not receive severance pay and wages during the same period.

*Plaintiff's Exhibit 4*

**Loss of a particular job shall not be considered a layoff under this provision if employment is available by the exercise of seniority rights as contained within this Agreement.**

**An employee shall not receive severance pay under this provision more than once based upon the same period of service.**

**EXHIBIT F**

**List of Employers represented by the Greater New York and Northern New Jersey Ice Cream Industry Labor Committee:**

**Sealtest Food Division of the  
National Dairy Products Corporation  
for its plant located at:  
444 Raymond Boulevard  
Newark, New Jersey**

**The Borden Company  
Pioneer Ice Cream Division**

**Abbotts Dairies Division of  
Fairmont Foods**

**Costa's Ice Cream Company**

**Istantwhip - Newark Inc.**

**First National Stores - Ice Cream Plant**

**Hershey Creamery Co.**

**E. A. Meagher, Inc.**

**Plaintiff's Exhibit 6**

**ICE CREAM INDUSTRY**

**AGREEMENT**

of the

**MILK DRIVERS**

and

**DAIRY EMPLOYEES  
UNION**

**LOCAL 680**

International Brotherhood of Teamsters,  
Chauffeurs, Warehousemen and  
Helpers of America

**EXPIRES, MIDNIGHT, APRIL 30, 1971**

535 HIGH STREET, NEWARK, N. J. 07102  
Telephone: MArket 2-4103

*Plaintiff's Exhibit 6*

AGREEMENT made as of this first day of May, 1968 between MILK DRIVERS and DAIRY EMPLOYEES UNION LOCAL 680, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, hereinafter called the "Union."

and

.....  
(Name)

.....  
(Address)

hereinafter called the "Company", wherein it is mutually agreed as follows:

1. This agreement shall be effective as of May 1st, 1968, and shall continue in effect until midnight on April 30th, 1971. During such period there shall be no reopening or negotiation with respect to any term or condition of the agreement, except as otherwise provided herein.

Ninety (90) days before May 1, 1971, either party desiring to terminate or modify this contract shall give notice, in writing, to such effect, and thereafter shall serve a written copy of its demands no later than sixty (60) days before May 1, 1971. All notices shall be sent by certified mail addressed to the Company at the above address and the Union at

*Plaintiff's Exhibit 6*

its headquarters at 535 High Street, Newark, New Jersey. In the event notice of termination or modification is not sent in accordance with the foregoing, the contract shall continue from year to year after the expiration date until terminated or modified in the manner herein provided.

This Agreement shall constitute the entire understanding between the parties hereto and shall supersede all prior agreements between them.

2. (a) This Agreement shall cover all employees of the Company except .....

.....  
outside salesmen, canvassers, merchandise men, professional employees, engineers, supervisors, as defined in the Labor-Management Relations Act, and all employees who are presently covered by contracts with other unions.

(b) The Company recognizes the Union as the exclusive bargaining representative of the employees comprising the unit described above employed by the Company at the following location or locations:  
.....  
.....  
.....

*Plaintiff's Exhibit 6*

and at such other location to which the Company's plant may be moved.

(c) All routes now served by employees covered by this contract shall continue to be served by employees covered by this contract while the routes exist.

(d) The Company agrees not to contract out work customarily performed by its employees. However, nothing herein contained shall prevent the Company from continuing to have work performed outside of the Company which prior to April 30, 1962 it customarily has had performed outside the Company. Supervisory employees shall not perform the duties of employees covered by this agreement.

In order to protect the job opportunities and labor standards of all employees in the industry-wide collective bargaining unit and at the same time provide for greater flexibility of the companies covered by this Agreement, the Company will not purchase or obtain products from any source including any other division or plant of the Company except from an employer in the Metropolitan Area as defined in this Agreement providing its employees with wages, hours and benefits and all other terms and conditions of employment equal to or better than the requirements of this Agreement. It is further agreed that the Company will not purchase or obtain products from any source whatever including any other division or plant of the Company if any permanent production employee who is actively

*Plaintiff's Exhibit 6*

employed on May 1, 1968 or thereafter is on lay-off from the production department and has been on lay-off for a period of one (1) year or less at the time of the purchase of the product.

The term "actively employed" for the purposes of this provision only, shall include employees who on May 1, 1968 or thereafter, are on:

- (a) Leave of absence
- (b) Vacation
- (c) Absence due to temporary disability caused by accident or illness.
- (d) Jury duty
- (e) Mourning leave
- (f) Suspension
- (g) It shall also include permanent production employees on lay-off as of May 1, 1968 who are thereafter recalled within the period the employee has recall rights.

The term "permanent employee," for the purpose of this provision only, shall mean employees who have attained twelve (12) continuous months of service.

The limitations with respect to the purchase of product while permanent production employees are on lay-off, as provided above, shall not apply to any of the following situations:

*Plaintiff's Exhibit 6*

(a) The purchase of novelty items (product sold in individual containers of less than one-half (1/2) pint regardless of the multiples in which it is sold) which the Company is not licensed to manufacture and for which a license is required, such as, Eskimo Pie, Good Humor, Captain Crunch, Bon Bons, Sunkist Pops and Welch Pops. It is understood that the foregoing enumeration is for the purpose of illustration only.

(b) The purchase of product not manufactured or packaged by the Company on May 1, 1965 or for any period during the twelve (12) months prior thereto.

(c) The purchase of product during emergencies such as plant breakdowns, fires, floods or acts of God.

(d) The purchase of a new product not previously manufactured or packaged which the Company manufactures or packages for a trial period of one (1) year or less and which it discontinues.

The provisions of this Section 2 (d) shall not be applicable to the purchase or obtaining of product by the companies listed in Schedule "A" which do not as of the effective date of this Agreement, manufacture ice cream products in the Metropolitan Area as defined in this Agreement, provided this exception shall not be used as a means for supplying other companies in order to circumvent this provision.

*Plaintiff's Exhibit 6*

This Section 2 (d) shall not apply to the importing of new products for a trial period not to exceed six (6) months, but such period may be extended by mutual agreement; nor shall it apply to the importing of products during emergencies such as plant breakdowns, fires, floods or acts of God.

In the event of a substantial loss of business making it impossible for a company to comply with the limitations of Section 2 (d) with respect to the purchase of products while permanent production employees are on lay-off, the Union and the Company shall meet to discuss the matter and attempt to arrive at an adjustment by mutual agreement, but in the event of disagreement such matter shall not be subject to arbitration hereunder, except with the agreement of the Union.

(e) The Company agrees for the term of this Agreement not to remove its manufacturing operations from the area of Local 680 and to continue to manufacture within the area of Local 680, and the Company, including any affiliates or subsidiaries, agrees that it shall not establish or operate a plant for production of ice cream or frozen dessert products outside of the Local 680 area for sale or distribution of such products in the Metropolitan Area; however, nothing herein shall restrict a company which formerly manufactured under contract with Local 757 or 680 from resuming such manufacturing under contract with said Local for distribution in its area.

*Plaintiff's Exhibit 6*

The area of Local 680 shall be the Counties of Union, Essex, Bergen, Hudson, Passaic, Middlesex, Ocean, Somerset, Morris, Monmouth, Hunterdon, Sussex, and Warren, in the State of New Jersey.

(f) Platform deliveries to jobbers, vending machine operators and special accounts shall be permitted, provided that such deliveries shall be limited to the same number of jobbers, vending machine operators and special accounts (to be determined by the number of trucks), presently receiving such deliveries; and provided further that a written statement listing such jobbers, vending machine operators and special accounts was signed by the Company and forwarded to the Union on or before May 15, 1952. A copy of each such statement revised and corrected to April 30, 1968 shall be executed by the parties on the signing of this Agreement. Any Company not previously a party to an agreement with the Union, shall sign and forward such list to the Union within 30 days from the date such Company executes this Agreement. Deliveries to other jobbers, vending machine operators and special accounts not served by commission drivers as regular customers on regular routes shall be made to their regularly established premises by hourly paid drivers covered by this Agreement.

All loading and unloading work in connection with platform deliveries shall be performed by employees covered by this Agreement, except that listed jobbers, vending ma-

*Plaintiff's Exhibit 6*

18. Should Local 757 or 680, at any time hereafter enter into any agreement with any company engaged in the manufacture and/or distribution of ice cream in the Metropolitan Area with terms and conditions more advantageous to such company, or should either union in the case of any such company which has signed this form of agreement countenance a course of conduct by such company enabling it to operate under more advantageous terms and conditions than as provided for in this Agreement, the employer party to this Agreement shall have the right if the matter is not satisfactorily adjusted within ten (10) days after written notice to the union making such contract, or condoning such conduct, to submit the matter to arbitration under the arbitration procedure set forth herein, and upon proof of such more advantageous terms and conditions, the arbitrator shall direct that such more advantageous terms and conditions be extended to the employer party to this Agreement.

The right to the foregoing relief to an employer party to this Agreement shall not apply where such more favorable terms and conditions are granted to or course of conduct countenanced in favor of an employer newly organized by the union until thirty-six (36) months after the signing of the first contract with such newly organized employer.

19. The Metropolitan Area as used in this Agreement shall consist of: the City of New York, the Counties of Nassau, Suffolk, West-

*Plaintiff's Exhibit 6*

chester and Rockland in the State of New York, and the Counties of Union, Essex, Bergen, Hudson, Passaic, Middlesex, Ocean, Somerset, Morris, Monmouth, Hunterdon, Sussex and Warren, in the State of New Jersey.

Dated April 30, 1968

Milk Drivers and Dairy Employees Union Local 680, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

By .....

By .....

Name of Company

.....

*Plaintiff's Exhibit 6*

**SCHEDULE C**

**SENIORITY**

1. Seniority of regular employees shall prevail within each craft and department within the plant for all purposes except layoff and rehire.
2. When a layoff becomes necessary, the junior employee in the craft group (department) in the order of plant seniority in any capacity covered by this agreement shall be the employee to be laid off.
3. Rehires shall be in the reverse order of layoffs. Employees who have one year or less of accumulated service with the Company shall cease to have rehire rights with the Company after one year of continuous layoff and other employees who have more than one year of accumulated service with the Company shall cease to have rehire rights with the Company after two years of continuous layoffs. Employees laid off through no fault of their own shall, in the order of their seniority for the period of time provided in this paragraph, be called to fill vacancies as they occur and must report for work within forty-eight (48) hours after notification to the employee by the Company, except that in the event an employee is employed elsewhere at the time he receives notification, he must report not later than one (1) week following the giving of such notice.

*Plaintiff's Exhibit 6*

of employment in the business acquired. Where the business so acquired has non-union employees, or employees who have been members of the Union for less than six (6) months, the question of seniority for the employees of the business acquired is to be agreed upon between the Union and the Company party to this agreement.

**EXHIBIT D**

**PENSION & WELFARE FUNDS**

Except as otherwise provided for herein, the uniform pension and welfare program previously instituted and the Employer contributions thereto shall be continued during the term of this Agreement.

Effective May 1, 1968, Employer contributions to the Pension Fund shall be at the rate of \$2.85 per day for each day paid for, up to a maximum of five (5) days per week.

Effective May 1, 1968, the normal and 35-year service pension benefits shall be increased to \$225.00 per month and the 30-year service pension to \$180.00 per month.

Effective May 1, 1968 a disability pension of \$150.00 per month after 20 years of service shall be provided, the existing disability pension of \$100.00 per month after 10 years of service to continue as heretofore.

*Plaintiff's Exhibit 6*

Effective May 1, 1969 Employer contributions to the Pension Fund shall be at the rate of \$3.25 per day for each day paid for, up to a maximum of five (5) days per week.

Effective May 1, 1969 a 25-year service pension shall be established providing for monthly benefits of \$125.00.

Effective May 1, 1968, the Employer shall contribute to the Pension Fund 24¢ per day for each day paid for, up to a maximum of five (5) days per week to provide termination benefits of \$300.00 for each year of future service up to a maximum of \$6,000.00.

Effective May 1, 1968, Employer contributions to the Welfare Fund shall be at the rate of \$2.18 per day for each day paid for, up to a maximum of five (5) days per week. The increased Welfare Fund contributions shall be utilized to provide expanded Blue Shield plan based on 575M fee schedule, Blue Cross maximum prescription drug coverage and disability benefits of \$65.00 per week.

The said Pension and Welfare Programs shall be administered under the existing Trust Agreement, with appropriate amendments, which said Trust Agreement, with appropriate amendments, shall continue during the term hereof. Upon request of the Union or of the Trustees the Employer shall promptly execute a copy of the Trust Agreement.

*Plaintiff's Exhibit 6***EXHIBIT E****SEVERANCE PAY**

Any permanent employee, who is permanently laid off through no fault of his own for lack of work or other economic cause after fifteen (15) years of continuous service with his employer shall be eligible for severance pay at the rate of one day of pay for each year of such service.

A day's pay for the purpose of this provision shall, in the case of an hourly paid employee, be computed at his current straight time hourly rate of pay, and in the case of a route driver paid on a daily rate plus commission shall be computed on the basis of 8 hours of straight time at the hourly rate of transportation drivers employed at the hourly rate, and in the case of any other daily paid employee, shall be computed at his current straight time daily rate.

Severance payments shall be in addition to any payments to which the employee may be entitled under this Agreement, and shall be paid in weekly installments commencing one week after layoff, it being the intention of the parties that an employee shall not receive severance pay and wages during the same period.

Loss of a particular job shall not be considered a layoff under this provision if em-

*Plaintiff's Exhibit 6*

ployment is available by the exercise of seniority rights as contained within this Agreement.

An employee shall not receive severance pay under this provision more than once based upon the same period of service.

Any employee who elects to be laid off shall not be entitled to severance pay.

**SCHEDULE A**

Abbott Dairies, Division of Fairmont Foods

Hershey Creamery Co. and/or Springfield Ice Cream Distributors

E. A. Meagher, Inc.

Pioneer Ice Cream, Division of the Borden Company, Paterson, N. J.

Philadelphia Dairy Products Company. Division of Dolly Madison Foods, Inc.

**Plaintiff's Exhibit 7****AGREEMENT AND DECLARATION OF TRUST**

AGREEMENT AND DECLARATION OF TRUST made and entered into as of the first day of April, 1952, in the City of New York, County of New York, and State of New York, by and between Milk Drivers and Dairy Employees, Local 338 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., Milk Drivers and Dairy Employees, Local 680 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., and Ice Cream Drivers and Employees, Local 757 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., called the Union, and . . . .

**ARTICLE I.****DEFINITIONS**

Section 1. **EMPLOYER.** The term "Employer" as used herein shall mean each employer who has duly executed an Ice Cream Industry Area-Wide Collective Bargaining Agreement with one of the above mentioned Local Unions, or any employer not presently a party to such an agreement who hereafter executes such an agreement provided that such employer satisfies the requirements for participation as established by the Trustees and agrees to be bound by the terms and provisions of this Agreement and Declaration of Trust.

\* \* \*

*Plaintiff's Exhibit 7*

**ARTICLE VI.**

**COLLECTION OF CONTRIBUTIONS**

Section 1. Each and every Employer shall pay to the Trustees ten cents (10¢) per straight time hour actually paid for up to a maximum of 40 hours per week and not to exceed 2,080 hours per work year for each of his Employees covered by the Ice Cream Industry, Area-Wide Collective Bargaining Agreements. The aforesaid ten cents (10¢) is hereby allocated as follows: five cents (5¢) shall be paid into and shall be the sole property of the Welfare Trust Fund and five cents (5¢) shall be paid into and shall be the sole property of the Pension Trust Fund. The aforesaid amounts, allocation and the sources of contributions shall be subject to modification or amendment in any manner hereafter agreed upon by the Employers and the Unions and set forth in written collective bargaining agreements.

**Plaintiff's Exhibit 8**

**ICE CREAM INDUSTRY  
AGREEMENT AND DECLARATION OF TRUST**

AGREEMENT AND DECLARATION OF TRUST made and entered into as of April 1, 1952, and as amended thereafter in the City of New York, County of New York, and State of New York, by and between Ice Cream Drivers and Employees Union Local 757, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Milk Drivers and Dairy Employees Union Local 680, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, called the Unions, and Breyer Ice Cream Division of National Dairy Products Corp., 444 Raymond Blvd., Newark 5, New Jersey, and each and every additional Employer whose signature is affixed hereto or to a counterpart hereof, hereinafter called the Employers.

...

**ARTICLE I**

**DEFINITIONS**

Section 1. EMPLOYER. The term "Employer" as used herein shall mean each employer who has duly executed a Collective Bargaining Agreement as hereinafter defined with one of the above mentioned Local Unions, or any employer not presently a party to such Agreement who hereafter executes such an Agreement with one of the above mentioned Local Unions and who agrees to be bound by the terms and provisions of this Agreement and Declaration of Trust. In the case of an employer in an industry other than

*Plaintiff's Exhibit 8*

the Ice Cream Industry, Employer shall mean one who has executed a Collective Bargaining Agreement and who has agreed to be bound by and has executed a copy of this Agreement and Declaration of Trust provided that the extension of coverage to the employees of such employer will not adversely affect the soundness of the Fund as determined by the Fund's Actuaries. It shall also include the Unions provided the Unions make contributions for their employees on the same basis as other employers, but in no event shall the Unions be entitled to participate in the selection of Employer Trustees, nor shall the Unions be entitled to vote as Employers.

\* \* \* \* \*

**ARTICLE VI****COLLECTION OF CONTRIBUTIONS**

Section 1. Each and every Employer shall pay to the Trustees the Contributions required by his written Collective Bargaining Agreement with the Union. The Trustees shall be entitled to demand and recover the said Contributions in their own name as Trustees for the uses and purposes herein set forth. Employer Payments shall be made promptly on the 15th day of each month covering all payroll periods ending during the preceding calendar month. Detailed reports of such payments in the form and manner and at such times as may be directed by the Trustees shall be made to the Trustees by each Employer. The initial report shall be complete in all detail. Thereafter all additions, subtractions and other changes shall be reported each month concurrently with payment. The Trustees may at any time audit the pertinent records of any employer in connection with the above.

**Plaintiff's Exhibit 10**

April 25, 1968

SEALTEST—BREYER—Local No. 680 Newark, N. J.

1. Oral confrontation [SIC; confirmation].
2. Sealtest agrees that if the change in Newark-Sealtest operation stated below adversely affects the Ice-Cream Industry Pension Fund, Sealtest will contribute such sum to the Fund. This actuarial determination will be made with the decision of Martin Segal Co. as final & binding in this regard. Segal & Co.'s study paid for by Sealtest & the Fund.
3. Sealtest agrees that each Newark employee permanently severed by the change in operation stated below will receive one week's straight-time pay for each full year of service provided such employee does not quit work before the date the Newark plant closes.
4. On and after November 2, 1968 Sealtest shall have the absolute right to discontinue plant manufacture in Newark, N. J. move to new distributing location in New Jersey from which 680 men will continue to distribute ice cream produced in Sealtest's Long Island Plant.

The above in (4) must be O.K.ed by industry so that its inclusion in the labor contract will not affect the provisions as to production facilities, etc. appearing in all agreements—in lite of equal treatment clause.

5. Severed Newark employees will be placed at foot of Long Island plant permanent seniority list.

J. J. LEYDEN for Sealtest

AARON L. SOLOMON

/

**Plaintiff's Exhibit 11**

(Letterhead of)  
**SOLOMON & ROSENBAUM**  
**COUNSELORS AT LAW**

**May 23, 1968**

Samuel J. Cohen, Esq.  
Cohen & Weiss, Esqs.  
605 Third Avenue  
New York, N. Y.

**Re: Ice Cream Industry with  
Locals 757 and 680  
Settlement Agreement**

Dear Sam:

Enclosed herewith please find twelve copies of settlement agreement which have been executed by Lou Schachter and myself representing the employers.

I would appreciate your obtaining the signatures of Larry McGinley of 680 and Peter Clark of 757 and returning three copies to Lou Schachter and three copies to us.

I am also enclosing twelve copies of the letter agreement dealing with "high crime areas" which have been executed by Lou Schachter and me and twelve copies of the special memorandum of agreement dealing with termination of production in the Breyer-Newark plant. This latter agreement has not, as yet, been signed in behalf of the company. We will have it executed after you have returned it to us signed in behalf of both unions.

Sincerely yours,

**AARON L. SOLOMON**

ALS:sbs  
enc.

**Plaintiff's Exhibit 12**

June 3, 1968

Aaron L. Solomon, Esq.  
1450 Broadway  
New York, N. Y. 10018

Re: 1968 Ice Cream Contract Negotiations

Dear Aaron:

Enclosed are the following papers signed by Locals 757 and 680:

1. 3 copies of main settlement agreement
2. 10 copies of supplementary memorandum with respect to the Breyer Newark plant
3. 3 copies of statement concerning high crime areas

With respect to item 2 as soon as signed by Breyer will you kindly return four copies.

I am sending three copies of items 1 and 3 to Louis Schacter [sic] at this time.

Will you kindly advise your clients to pay wages and other benefits under the new contract without delay.

Sincerely yours,

SAMUEL J. COHEN

SJC:MN  
Enc.

*By Hand*

cc: Louis Schacter [sic], Esq.  
Locals 757 and 680

**Plaintiff's Exhibit 13**

(Letterhead of)

**SOLOMON & ROSENBAUM**  
Counselors At Law

June 5, 1968

Samuel J. Cohen, Esq.  
Cohen & Weiss, Esqs.  
605 Third Avenue  
New York, N. Y.

Dear Sam:

I acknowledge with thanks the receipt of the signed settlement agreements as well as letter agreement on "high crime areas". The Breyer agreement re Newark plant has been forwarded to the company in Philadelphia and as soon as I receive same, I will forward copies to you.

I am enclosing, at this time, photo copies of correspondence between the Breyer Ice Cream Company and Local 757 concerning understanding on company furnished car plan as well as car allowance for Breyer cabinet servicemen using their own cars. This, of course, along with the signature on the Breyer-Newark closing will complete our recent settlement.

Looking forward to seeing you soon, I am

Sincerely yours,

**AARON L. SOLOMON**

ALS:sbs  
enc.

**Plaintiff's Exhibit 14**

(Letterhead of)

**SOLOMON & ROSENBAUM**  
Counselors At Law

**June 10, 1968**

Samuel J. Cohen, Esq.  
Cohen & Weiss, Esqs.  
605 Third Avenue  
New York, N. Y. 10016

**Re: 1968 Ice Cream Contract**

Dear Sam:

Enclosed herewith are four fully signed copies of supplementary memorandum with respect to the Breyer-Newark plant, pursuant to the request contained in your letter of June 3, 1968.

Kindest regards.

Sincerely yours,

**AARON L. SOLOMON**

ALS:sbs  
enc.

**Plaintiff's Exhibit 15**

MEMORANDUM OF AGREEMENT entered into the 25th day of April, 1968 by and between SEALEST FOODS, DIVISION NATIONAL DAIRY PRODUCTS CORP. and LOCAL 757, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and LOCAL 680, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

The parties hereto agree as follows:

1. On and after November 2, 1968 the company shall have the absolute right to discontinue production in its plant located at 444 Raymond Boulevard, Newark, New Jersey and relocate its distribution facilities to a new location in Northern New Jersey from which employees covered by the agreement between the company and Local 680, I.B.T. shall distribute ice cream and ice cream products produced in the company's plant located at 34-09 Queens Boulevard, Long Island City, New York.
2. The company agrees to pay to each employee whose employment is permanently terminated as a result of the discontinuance of production hereinabove referred to, one (1) week pay at straight time rates as severance pay for each full year of employment with the company provided the employee does not voluntarily quit employment before the date of the discontinuance of production.
3. The consultants to the pension fund shall make an actuarial study of the impact, if any, of the discontinuance of operations and the termination of the employees upon the pension fund as of the date of the discontinuance of such operations, the cost of which shall be borne jointly by the company and the fund. If the consultants to the fund determine that the fund has been adversely affected as a result

*Plaintiff's Exhibit 15*

of the discontinuance of operations by the company at its Newark facility, the company agrees to pay to the fund the sums determined by the consultants. The decision of the consultants shall be final and binding on the parties.

4. All employees whose employment is terminated as the result of the discontinuance of production at the company's Newark facility shall be placed at the end of the permanent seniority list of the Long Island City plant of the company.

5. During the course of negotiations, the contents of this memorandum of agreement were communicated to the representatives of the employers signatory to the industry area wide collective bargaining settlement agreement with the unions and all parties have agreed that the within memorandum of agreement does not violate the provisions of Section 18 of the industry area wide agreement.

SEALTEST FOODS, DIVISION  
NATIONAL DAIRY PRODUCTS CORP.

By V. L. Ashenbrenner

**LOCAL 757, I.B.T.      LOCAL 680, I.B.T.**

By Peter F. Clark By Lawrence McGinley  
President President

**Plaintiff's Exhibit 16****MEMORANDUM**  
**MARTIN E. SEGAL COMPANY**

October 9, 1969

From Thomas W. Fitzgerald

*re*

To Board of Trustees

Gentlemen:

You will recall that our Company was to be requested to determine the financial impact upon the Pension Fund as a result of the termination of Breyers New Jersey Plant.

We have reviewed all of the records of the company as well as the records of the Fund Office and arrived at the following conclusions:

Total contributions through

May 25, 1968 ..... \$ 732,400

Benefits paid through January 1, 1969:

Pensioners: ..... \$ 418,700

Severence benefits: .... 20,500

Total ..... 439,200

Net assets available:

293,200

Liabilities as of January 1, 1969:

Pensioners: ..... \$1,035,800

Active employees eligible to retire: ..... 235,500

Total ..... \$1,271,300

Deficit ..... \$ 978,100

As you can see a deficit of \$978,100 has been incurred as a result of this closing. Should you require any further information, please do not hesitate to contact us.

/elc

**Plaintiff's Exhibit 19**

(Letterhead of)

**SOLOMON & ROSENBAUM**  
Counselors at Law

July 11, 1968

Mr. Irving McDougall  
Martin E. Segal Company  
730 Fifth Avenue  
New York, N. Y. 10019

Re: Breyer Ice Cream, Newark Plant

Dear Mac:

In answer to your recent inquiry, the company has furnished the enclosed information. While I believe the inquiry and actuarial study is premature at this time, I had asked the company to supply this information if they had it and they recently sent it to me.

I think there are many other factors to be considered.  
If there are any further questions please do not hesitate to contact me.

With kindest regards, I am

Sincerely yours,

/s/ AARON L. SOLOMON

ALS/bs  
enc.

**Plaintiff's Exhibit 20**

February 4, 1969

Mr. Irving A. McDougall  
Vice President  
Martin E. Segal Company  
730 Fifth Avenue  
New York, New York 10019

Dear Mac:

At your request, we are enclosing additional data on the Breyer, New Jersey employees.

One (1) list consists of 2 sheets and indicates the people who were terminted due to the closing of the plant. The second list indicates the New Jersey employees, totaling 6, who were transferred to New York because the plant closed.

A third list is a total of all Termination payments made to New Jersey Breyer employees, from the inception of the Termination Benefit plan, on May 1, 1962 through January 9, 1969, which is the date of the original data.

If you have any questions regarding the material, please call me.

In order to expedite the lists, we are sending our work sheets, rather than re-typing them in final form.

Sincerely,

/s/ ANNE GEBERER  
Anne Geberer

Fund Manager

AG:r  
Enclosures

## Plaintiff's Exhibit 21

February 4, 1969

Mr. Irving A. McDougall  
 Vice President  
 Martin E. Segal Company  
 730 Fifth Avenue  
 New York, New York 10019

Dear Mac:

In reference to your request of contributions for the periods from the inception of the Fund through April 30, 1958, please note below:

Period	Rate Per Hour	Rate Welfare	Distributed Pension
5/1/52 to 4/30/53	\$ .12	\$ .07	\$ .05
5/1/53 to 4/30/56	\$ .13	\$ .08	\$ .05
5/1/56 to 4/30/58	\$ .19	\$ .08	\$ .11

Our records for the periods, 5/1/51 to 5/1/52, are not clearly indicated. After checking with Sam Cohen's secretary, she informed me her records of that contributions were not at the rate of \$.10 per hour, distributed through Pension—\$.05 and Welfare—\$.05.

This completed the data, as requested by you.

Sincerely,

/s/ ANNE GEBERER  
 Anne Geberer

Fund Manager

AG:rr

**Plaintiff's Exhibit 22**

June 5, 1968

Aaron Solomon, Esq.  
1450 Broadway  
New York, New York 10017

Dear Aaron:

I must apologize most abjectively for my oversight in not sending you copies of my letters regarding the Breyer Ice Cream termination. I can only rely on the fact that you have known me for some time to persuade you that this oversight was accidental and not intentional.

Enclosed is a copy of a letter which I received from Sam Cohen, a letter of instructions on collecting the data to Anne Geberer, and a covering note to Sam and Larry raising the question as to the possibility that some of the Breyer Newark employees might obtain employment elsewhere. This is all of the correspondence so far.

If there are any other interested parties that you think should have copies of the correspondence, please let me know and I will arrange for copies to be sent to them.

With best personal regards

Sincerely

IRVING McDougall

IM:hg  
enc.

### Defendant's Exhibit A

#### UNION PROPOSALS FOR 1968 ICE CREAM CONTRACT

Locals 757 and 680 make the following contract proposals with respect to the contract to be effective May 1, 1968: Page references are to the printed booklet of Local 757:

1. Page 3, § 1:

Revise to provide a one year contract commencing May 1, 1968.

34. Pages 51-52, Exhibit D: Amend by adding:

"An Employer who, by reason of termination of all or any part of its business, or of sale, lease, or for any other reason, terminates the employment of employees in sufficient number to affect the pension fund actuarially shall be obligated to defray the cost of an actuarial study to determine the effect of such terminations and to make such payment or payments to the fund as may be found actuarially required to offset any such effect. In all such cases (except for layoffs or discharges in the ordinary course of business) the Employer shall continue paying the required contributions to the welfare fund until the expiration date of this agreement, and shall continue contributions to the pension fund for employees who would, but for such termination, become entitled to a form of pension benefit prior to the said expiration date, for the same period; provided, however, that such continued contributions shall terminate with respect to any former employee who within that period of time secures employment subject to the provisions of this agreement."

35. Pages 51-52, Exhibit D:

Increase rate of severance pay to one week of pay for each year of service to be payable in a lump sum rather than in installments.

**Defendant's Exhibit B**

ICE CREAM INDUSTRY  
1968 NEGOTIATIONS

SHERATON MOTOR INN  
April 9, 1968  
10:00 A.M.

PRESENT

INDUSTRY	UNION
E. Glynn	L. Lanza
D. Mott	I. Searson
J. Kelly	B. Kerrigan
D. Klein	T. Carlino
A. Solomon	E. Parish
L. Schachter	P. Clark
I. Reier	S. Cohen
H. Frem	T. Iorio
E. Boss	E. Hutnik
I. Zalkin	
L. Marchiony	

Item 34 is a very interesting proposal.

You remember what we negotiated with the Swift people when they terminated their business in Brooklyn.

We would like to formalize the procedure.

I am not the author of this clause. Tom Parsonnet is and I am in accord.

This is a non-controversial proposal for the benefit of the Funds with no gimmicks.

Solomon: The first part of the clause is general. Suppose an employer goes out of business due to insolvency proceedings.

*Defendant's Exhibit B*

Cohen: The employees can be creditors as well as anyone else.

This proposal establishes a claim for the Fund against an employer who actuarially bursts the Fund.

Schachter: What effect are we trying to offset?

Cohen: Any effects determined by the impartial actuary employed by the trustees of the Funds.

If you think the clause needs tightening up, then do so by all means.

You can invite Tom Parsonnet here to talk to us.

Solomon: Shouldn't we talk to our actuaries?

Cohen: Yes. As of now, the Segal office has no knowledge of this.

A loss by layoff would not be part of this proposal, but a merger, where many employees would lose jobs could effect [sic] us.

Solomon: Maybe we should meet with MacDougal before the 17th.

Cohen: The clause is meant to be fair. If laid off employees were picked up by someone else there would be no loss.

Solomon: We don't think any employer should embarrass the Fund, but what about the employer who has paid contributions for all those years it was in business.

Cohen: I agree with you. But there can be a situation with a company signing a contract, qualifying their people and going out of business.

I suppose if you all pay a little more then you'll be paying for the bad guy.

Solomon: Item 35 refers to Exhibit "E".

**Defendant's Exhibit C**

[EXCERPT FROM NOTES OF MR. MOTT AT MEETING OF  
APRIL 9, 1968]

[Union Proposal No. (34)] Sam [Mr. Cohen]: (Attempt to formalize the Swift agreement.)

**Defendant's Exhibit D**

[EXCERPTS FROM NOTES OF MR. COHEN AT  
MEETINGS OF APRIL 9, 25 AND 26, 1968]

**ICE CREAM NEGOTIATIONS**

2/21/68—9:00 A.M.—Atlantic Sheraton  
Cabinet Room

L 757—Clark, ( Observer  
Carlino ( L  
L 680—McKinley ( Jack Tiebout  
—Cronin ( Chicago  
— — — ?  
SJC

*L 680 proposals:*—

(1) Tom Parsonett clause re payment of add'l p & w contrib. in event of termination of employees in volume to affect *actuarial soundness*.

4/9/68 [Union Proposal No.] (34) Tom Parsonett clause  
—will be submitted by co's to Irv. McDougall for comment.

—SJC says this should be non-controversial. Is solely for purpose of preserving the p & w Funds. Co's will study and give us their comments.

4/25/68 *Breyer-Newark Removal*

9:45 Caucus with Union Subcom. at Coffee Shop (9:45-10:30)

11:45 SJC, L. McG., Pete Cl, A. Solomon, J. Leyden, D. Mott, Ed Glynn, Room 1223 (11:45-12:30)  
(SJC at UPS for Welfare Fund Meeting 2:00-4:00)

*Defendant's Exhibit D*

*4:45 P.M. Room 1223*

Jim Leyden of Bernard Segal office  
Don Mott of Breyer  
Ed Glynn of Breyer  
A. Solomon  
SJC  
L. McGinley  
P. Clark  
Leyden

(1) As to requested assurance that no employer in indy will discontinue any plant or any operation during term of next contract, Breyer will agree to any language that rest of indy will agree. He & A. S. say there is no intention to discontinue anything, incl. cab-service depts.

This plus Breyer Exception has to be written into contract

(2) Independent actuarial study as to whether change in Newark will adversely affect Ice Cream Indy pension fund. If adverse will negotiate a solution or will negotiate with rest of employers.

They'll pay 1/2 the cost of actuarial study

(3) One week's pay per year of accum. service O.K., regardless of what we negotiate with rest of indy.

For Breyer we must remove 15 yr. qualif.

(4) One year's further operation of Newark plant is too long. Will go 3 or 4 months.

(5) Job preference, after permanent 757 employees at L. I. is agreeable.

*Defendant's Exhibit D*

A.S. says no assurance that (3) will be made part of  
indy contract.

*Union caucus*

(1) Exception for Breyer has to be written into contract. Also there should be oral statement of intention by (?) entire industry.

(2) M.E. Segal to make study. Breyer to pay  $\frac{1}{2}$ . If loss shown Co. to pay it. Their own actuary may examine records.

(3) 15 yr. qualif. should be deleted here.

(4) Operate until Nov. 2 [thru 11/1]

(5) Job preference O.K.

(6) This must be part of *indy barg.*

*6:30—Room 1223*

Above results of union caucus given to Cos. They will caucus & call us at Room 1423.

*7:15—Room 1423*

Leyden presents written summary of agreement with above. SJC says this is acceptable statement of principles agreed on. If more precise language is needed we will work it out. All agree that Leyden's handwritten statement will be xeroxed & distributed by Solomon tomorrow. *Adj'd. at 7:30.* Next meeting Fri. (tomorrow) 10 A.M.  
4/26/68 (34) Parsonett prov. withdrawn

**Defendant's Exhibit E**

ICE CREAM INDUSTRY  
1968 NEGOTIATIONS

SHERATON MOTOR INN  
April 17, 1968  
11:10 A.M.

**PRESENT****INDUSTRY**

J. Luker  
H. Frem  
I. Reier  
I. Zalkin  
A. Solomon  
L. Schachter  
D. Klein  
D. Mott  
E. Glynn  
J. Kelly  
H. Stoller

**UNION**

L. Lanza  
I. Searson  
B. Kerrigan  
T. Carlino  
M. Parish  
S. Cohen  
L. McGinley  
D. Cronin  
P. Clark

**MARTIN SEGAL OFFICE**

I. MacDougall  
C. Mason

Solomon: There were some other things we wanted to talk to Irv about—the volumetric formula and Union's proposed No. 34.

MacDougall: The only thing that comes to mind is problems under Taft-Hartley.

Cohen: I don't see a problem. What we have in mind is something like the Swift situation where contributions are not made for the length of time contemplated.

Solomon: This clause goes beyond what you've mentioned. You contemplate the continuation of contributions until an employee is eligible for retirement.

The question of Taft-Hartley violations have nothing to do with Irv. MacDougall.

**Defendant's Exhibit F**

**ICE CREAM INDUSTRY**

**SHERATON MOTOR INN**

April 26, 1968—11:45 A.M.

INDUSTRY	UNION
E. Glynn	L. Lanza
D. Mott	I. Searson
J. Kelly	B. Kerrigan
D. Klein	T. Carlino
A. Solomon	E. Parish
L. Schachter	P. Clark
R. Martin	S. Cohen
H. Frem	E. Hutnik
I. Zalkin	L. McGinley
I. Reier	
J. Kessler	
H. Armel	

12:10 P.M. CAUCUS.

3:25 P.M. RESUME.

Cohen: We will start at the beginning of our proposals.

1. A one-year contract is still a preference. . . .
34. Withdrawn except as to Breyer's.

**Defendant's Exhibit G**

[NOTES OF MR. LEYDEN AT  
MEETING OF APRIL 25, 1968]

April 25, 1968

SEALTEST-BREYER — LOCAL NO. 680, Newark, N. J.

1. As agreed by industry.
2. Sealtest agrees to have independent actuarial study as to whether change in Newark-Sealtest operation will adversely affect Ice Cream Industry Pension Fund. If it does, will negotiate solution.

or

Accept whatever Local 680 negotiates with other ice cream employees on #34.

3. Sealtest agrees to 1 week severance for employees with 15 or more years of accumulated service—whatever is negotiated with other 680 employees on #35.
4. Notwithstanding any provision in labor agreement between 680 & Sealtest, Newark—on and after November 2, 1968 Sealtest shall have right to discontinue plant manufacture in Newark—move to new distributing location from which 680 men will continue to distribute ice cream produced in Long Island plant.
5. Severed Newark employees placed at foot of Long Island plant permanent list.

**Defendant's Exhibit H**

[NOTES OF MR. LEYDEN AT  
MEETING OF APRIL 25, 1968]

1. Oral Commitment.

2.

3. Sealtest pay

Less than 15 years

Traffic	—	12
Garage	—	None
Cabinet	—	"
Production	—	6
Maintenance	—	None
Women	—	None
Office	—	73

Larry—asking he says almost 100 extra weeks.

**Defendant's Exhibit I**

[EXCERPTS FROM NOTES OF MR. MOTT  
AT APRIL 25, 1968 MEETING]

4-25-68  
11:45

**BREYER—680 NEGOTIATIONS**

Present: McGinley, Cohen, Clark, Mott, Leyden, Glynn, Solomon (as "industry watchdog")

(Larry agreed that Parsonnett told him everything Buddy told Tom)

Larry: "bottom line needs" for 680 & 757;

- (1) Need assurance that nobody else is involved; that part of an operation—either in 680 or 757 will move during life of the contract; (contract prevents it—but wants moral assurance)
- (2) Union proposals 34 & 35  
(Sam: "Larry wants an appropriate adjustment—not language")
- (3) Plant to remain open for 1 more year—need this to ratify contract; (at closing, 680 employees go to bottom of 757 permanent priority list)

Caucus

\* \* \*

Response to Larry's Demands:

4-25-68  
6:30 PM

Leyden:

- (1) Will go along w/ industry

*Defendant's Exhibit I*

- (2) Sealtest agrees to actuarial study & the results *or* will negotiate a solution *or* will do whatever the industry does.
- (3) Sealtest agrees will do it *or* whatever is done w/  
industry.
- (4) Plant closing—will negotiate.
- (5) Senior 680 permanent people will placed [sic] at  
bottom of 757 permanent list.

Met w/ McGinley, Cohen & Clark and agreed to union demands with following changes:

- Plant would close in 6 mos.—11/1/68—~~not 1/1/69~~
- Union requested severance for all employees, disregarding 15 yr. minimum yrs. of service requirement.

**Defendant's Exhibit J**

**AGREEMENT**

AGREEMENT made this 21st day of April, 1966, among Swift & Company (hereinafter referred to as "Company"), Milk Drivers and Employees Local #680 (hereinafter referred to as "Local 680"), and Ice Cream Drivers and Employees Local 757 (hereinafter referred to as "Local 757"), and their respective successors or assigns;

WHEREAS Local 680 and Company are parties to a collective bargaining agreement dated August 3, 1965, covering employees at the Company's Woodbridge, New Jersey, Ice Cream Plant (hereinafter referred to as "Woodbridge") ;

WHEREAS Local 757 and Company were parties to a now expired collective bargaining agreement covering employees at the Company's Brooklyn, New York, Ice Cream Plant (hereinafter referred to as "Brooklyn") ;

WHEREAS Local 757 claims that Company has an obligation to its former Brooklyn employees whose employment was terminated as a result of termination of operations of its Brooklyn plant;

WHEREAS Company maintains that all terms and conditions of its prior agreement with Local 757 have been met and there is no surviving contract and no restriction or obligation upon the Company or its right to do business in New York or any other state; and

WHEREAS the parties seek to avoid industrial strife, to accomplish the goal of benefits for employees, and to eliminate any doubt as to the Company's right to do business in New York or any other state;

*Defendant's Exhibit J*

Now, THEREFORE, it is agreed among the parties as follows:

1. With respect to the 13 former Brooklyn employees who retired on pension following the termination of operations at Brooklyn, the Company shall pay to the Ice Cream Industry-Drivers and Ice Cream Employees Unions Pension Trust Fund (hereinafter referred to as "Pension Fund") a sum of \$8,015.05, which reflects the amount computed by the Unions as necessary to equal three (3) years' contributions for said 13 employees to the Pension Fund.

2. With respect to the 51 employees separated from Brooklyn but who did not retire on pension, the Company shall pay:

- (a) To the Pension Fund a sum of \$23,227.13;
- (b) To the Ice Cream Industry-Drivers and Ice Cream Employees Unions Welfare Trust Fund (hereinafter referred to as "Welfare Fund") a sum of \$19,004.01;

which sums reflect the amount computed by the Unions as necessary to equal one (1) year's contributions and interest for said 51 employees to said Funds.

3. The Company will pay into the Pension Fund a sum of \$3,201.53 which reflects the amount computed by the Unions as equal to interest that would have been earned if contributions due the said Fund had been paid monthly when due and not delayed during period of escrow.

4. It is recognized that the foregoing amounts set forth in paragraphs 1, 2 and 3 above, are estimates accepted by all parties as final for the purpose of settling the existing controversy and that these amounts are not subject to review or reexamination.

*Defendant's Exhibit J*

5. Each of the 51 employees separated as a result of the termination of operations of the Brooklyn plant, including the 8 persons now employed at Woodbridge, shall be offered employment under the terms of the collective bargaining agreement at Woodbridge. Such offer shall be mailed on or about April 28, 1966, to the last known place of residence of said employees as shown on Company records and shall require that if the employee desires to accept the offer, he shall make application for employment to the Manager or Superintendent of Woodbridge on or before May 28, 1966. Each such applicant shall be employed at Woodbridge not later than seven (7) working days after his application is received, provided the applicant is able to perform work normally performed at Woodbridge. Copies of the offer of employment to each such employee shall be mailed to Local 757 at its regular place of business, simultaneously with the mailing of the offer to the employee.

6. For purposes of computing service of any of the 51 employees who is employed at Woodbridge (but not for seniority) service with the Company shall be determined from the date of employment at Woodbridge.

7. For purposes of computing seniority, each of the 51 employees who is accepted for employment at Woodbridge, which includes the 8 employees already accepted since April 30, 1965, shall enjoy seniority with respect to all of the other 51 employees in accordance with the seniority held by them on April 30, 1965, at Brooklyn.

Said employees, however, shall enjoy seniority at Woodbridge subject to the seniority of any and all regular Woodbridge employees who had accumulated seniority at Woodbridge and were listed on the Woodbridge seniority list as of April 30, 1965.

*Defendant's Exhibit J*

8. Each of the 51 employees who is accepted for employment at Woodbridge shall be employed as a regular employee and shall be afforded an opportunity to work as provided in paragraph 5 of the current agreement between the Company and Local 680, and shall be guaranteed such employment until January 14, 1967.

9. In consideration of the foregoing by the Company, Local 757 relinquishes all claim, right or cause of action arising out of any prior agreement or its prior status as a bargaining representative of any employees of Company including any claim that the Company should not conduct business in the area under jurisdiction of Local 757.

10. Any dispute or difference regarding the application or interpretation of this agreement shall be subject to the same grievance procedure and arbitration procedure provided in the current agreement between Local 680 and Company, and all parties shall be subject to the provision of paragraph 4 of that agreement restricting economic sanctions.

Executed this 21 day of April, 1966.

MILK DRIVERS AND DAIRY EMPLOYEES UNION  
LOCAL 680 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

By L. McGINLEY  
Pres.

ICE CREAM DRIVERS AND EMPLOYEES UNION  
LOCAL 757 INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

By PETER F. CLARK  
President

SWIFT & COMPANY  
By A. E. PRENDERGAST  
Mgr.

**Defendant's Exhibit N**

(Letterhead of)

COHEN AND WEISS  
Counselors at Law  
605 Third Avenue  
New York 16, N.Y.

May 27, 1968

Mr. Irving McDougall  
Martin E. Segal & Co. Inc.  
730 Fifth Avenue  
New York, N. Y. 10019

Re: 1968 Ice Cream Contract Negotiations

Dear Irv:

I enclose herewith copy of agreement entered into between Locals 680 and 757 and Sealtest Foods concerning the discontinuance of the Breyer plant at Newark.

Your attention is directed particularly to Section 3.

I also wish to call your attention to the following paragraph which will be in the main agreement:

"The parties agree to request the Trustees of the Pension Fund to amend the Pension Plan, if necessary, to provide that the severance pay paid by the Sealtest Foods Division of National Dairy Products Corp. to its employees severed from employment as a result of

*Defendant's Exhibit N*

the discontinuance of production at its Breyer-Newark plant, as provided in a separate agreement between Sealtest Foods, Division of National Dairy Products Corp. and Local 680, shall be credited to the employees as if they had worked during the number of weeks following the termination of employment equivalent to the number of weeks of severance pay."

Will you kindly have your office make such study which will be appropriate under the circumstances and will you kindly keep in touch with Larry McGinley as well as myself concerning this matter.

Sincerely yours,

Sam

SJC:MN

Enc.

cc: Local 680  
Local 757

**Defendant's Exhibit O**

**MARTIN E. SEGAL COMPANY**

**May 31, 1968**

Mrs. Anne Geberer  
Manager  
Ice Cream Industry-Drivers and  
Ice Cream Employees Unions  
Pension and Welfare Funds  
250 West 57 Street  
New York, N. Y.

Re: Breyer Newark Plant

Dear Anne:

I recently received from Sam Cohen a copy of the agreement concerning the discontinuance of the Breyer Plant at Newark. Provision 3 of this agreement provides that the Consultants will make an actuarial study of the affect on the Pension Fund of the discontinuance of operations.

In order to do this we will need considerable information from your office as follows:

- 1) With respect to all active employees we will need
  - a) Date of birth
  - b) Sex
  - c) Length of service
- 2) We will need the following information with respect to every surviving pensioner whose last employer was Breyer, Newark

*Defendant's Exhibit O*

- a) Date of birth
- b) Sex
- c) Monthly benefit amount

3) We will need to know the aggregate contributions from inception made by Breyer, Newark.

4) We will need to know the aggregate amount of pension payments previously made to all pensioners whose last employer was Breyer, Newark.

I realize that this represents a great deal of work for you and I would appreciate it if you would let Sam, Larry and me know the approximate date by which this data will be assembled.

With best, personal regards

Sincerely

IRVING McDougall

IM:hg

cc: Samuel J. Cohen, Esq.  
Mr. Lawrence McGinley

**Defendant's Exhibit Q**

(Letterhead of)

BREYER DIVISION  
SEALTEST FOODS, INC.

CERTIFIED MAIL

January 24, 1968

Mr. Lawrence McGinley  
President,  
Local 680,  
International Brotherhood of  
Teamsters, Chauffeurs,  
Warehousemen and Helpers  
of America,  
535 High Street  
Newark, New Jersey.

Dear Larry:

This is to confirm the advice previously given to you of our intention to discontinue production at our facility located at 444 Raymond Boulevard, Newark, New Jersey, on May 1, 1968. This, of course, will affect employees covered by the Ice Cream Industry area-wide agreement and the clerical employees whom you represent.

Accordingly, we are hereby giving notice, under paragraph 1 of the Agreement of May 1, 1965, of our desire to modify the agreement so as to permit this discontinuance of production, or to terminate the Agreement if necessary to accomplish this objective.

*Defendant's Exhibit Q*

We are prepared to meet with you to discuss the problems incidental to the discontinuance of production.

Very truly yours,

SEALTEST FOODS—BREYER DIVISION  
NATIONAL DAIRY PRODUCTS CORPORATION

/s/ V. L. ASHENBRENNER  
V. L. Ashenbrenner  
Vice President

**Defendant's Exhibit R (for identification)****BREYER ICE CREAM DIVISION—NEWARK PLANT  
Study as of May 1, 1968**

Estimated costs on a continuing basis:

Past Service Liability .....	\$714,000
Normal Cost .....	9,500

Estimated termination liabilities:

For Retirement Benefits .....	\$422,000
For Severance Benefits .....	106,000
Total .....	\$528,000

Reconciliation between continuing and terminating bases:

Difference Between Past Service Liabilities .....	\$292,000
Present Value of Future Normal Costs .....	76,000
Present Value of Additional Cost of Retirement Benefits if Plan is Continued .....	\$368,000
Present Value of Expected Contributions .....	260,000
Savings, if Terminated .....	\$108,000*

\* Sufficient to pay the cost of the Severance Benefits.

**Defendant's Exhibit S**

(Letterhead of)

**MARTIN E. SEGAL COMPANY**

Consultants and Actuaries

June 14, 1968

Aaron Solomon, Esq.  
1450 Broadway  
New York, New York 10017

Re: Breyer Ice Cream, Newark Plant

Dear Aaron:

Larry McGinley called me a few days ago to say that in his opinion an actuarial study at this time, is premature and he suggested that it not be done until after the first of the year when everyone will have a clearer notion of the extent to which terminated employees will find reemployment.

One of the longest parts of this job for Anne is getting a summation of all payments made since inception by the Breyers Newark plant. While it is not a totally impossible job, it is a very difficult one, and it means going into the storage files and making a hand-search through the remittance records.

While there is no hurry about it, perhaps you can find out within the next six months, whether the company has a record of the contributions made on behalf of the employees

*Defendant's Exhibit S*

at the Newark plant. We would be interested in this on a yearly total basis and would not need to have any further breakdown.

With best personal regards

Sincerely

IRVING McDougall

IM:hg

cc: Samuel J. Cohen, Esq.  
Messrs. Pete Clark  
Lawrence McGinley  
Mrs. Anne Geberer

336a

**Defendant's Exhibit W**

ICE CREAM INDUSTRY—DRIVERS AND  
ICE CREAM EMPLOYEES UNIONS PENSION TRUST FUND  
ANNUAL ACTUARIAL REVIEW

May 1, 1967 to April 30, 1968

*Defendant's Exhibit W*

(Letterhead of)

**MARTIN E. SEGAL COMPANY**  
Consultants and Actuaries

May 8, 1969

The Board of Trustees  
Ice Cream Industry—Drivers and  
Ice Cream Employees Unions Pension  
Trust Fund  
250 West 57 Street  
New York, New York

Gentlemen:

We are pleased to present our Actuarial Valuation and Review of the Pension Fund for the fiscal year ended April 30, 1968.

The report indicates the extent to which the Plan met its cost requirements, compares the actual experience with the assumptions upon which the cost calculations were based, and sets forth a new projected cost for the Plan.

The report is presented under the following headings:

- I. RECALCULATED COST
- II. CONTRIBUTIONS AND EXPENSES
- III. BENEFIT EXPERIENCE

*Defendant's Exhibit W*

**IV. INVESTMENT EXPERIENCE**

**V. SUMMARY AND CONCLUSIONS**

We will, of course, be prepared to discuss this report with you at a forthcoming meeting of the Board of Trustees.

Sincerely yours,

**MARTIN E. SEGAL COMPANY**

By .....

Thomas W. Fitzgerald

TWF:elc

*Defendant's Exhibit W***II. CONTRIBUTIONS AND EXPENSES**

During fiscal 1968 about \$1,365,100 was received in employer contributions net after audit and collection expenses. An additional \$93,500 was received and allocated to the termination benefits account. Administrative expenses came to \$49,800 and retirement counselling fees to \$2,200 leaving \$1,313,100 available to meet the Fund's actuarial requirement for the year for pension benefits. The actuarial requirement as recalculated for fiscal 1968 in the previous section of this report amounts to \$1,297,200 and thus the Fund experienced an asset gain from contribution experience of \$15,900 for the year. When interest is taken at the assumed rate, the asset gain for fiscal 1968 comes to \$16,100.

The Trustees will also wish to keep in mind the meaning of the phrase "Actuarial Requirement" as used in the preceding paragraphs. As we have noted before, the funding method adopted by the Trustees consists of the payment of the "normal cost" together with the payment of the interest on the "unfunded past service liability." The actuarial requirement so calculated is the annual amount needed to continue the Fund. In other words, if all of the assumptions work out as projected, the Fund can be continued indefinitely without a reduction in benefits or without the need for greater employer contributions.

Such a funding system for a relatively young group such as yours will normally result in a fund on hand at any point which will be equal to or greater than the liability for pensioners. However, if all employees who are currently eligible for regular and service pensions should retire immediately, the Fund's total reserves would not be sufficient to cover the lifetime liability for all pensioners then on the

*Defendant's Exhibit W*

rolls. This does not mean that the Fund will not be able to meet its pension payments; it merely means that the Fund has insufficient funds on hand to guarantee lifetime pensions to those already retired if the Fund were to terminate. However, this appear [sic] to be a rather unlikely possibility. It is reasonable to believe that the Trustees can look forward to maintaining a fund at least as large as the liability for pensioners unless there is a radical change in the economics of the industry.

*Defendant's Exhibit W*

(Letterhead of)

MARTIN E. SEGAL COMPANY

April 15, 1969

ICE CREAM INDUSTRY-DRIVERS AND ICE CREAM  
EMPLOYEES UNIONS PENSION TRUST FUND

ACTUARIAL VALUATION

This is to certify that we have prepared an actuarial valuation of the fund as of April 30, 1968, taking into account the amendments effective May 1, 1968.

Income to the fund from employer contributions during the year ended on that date (a) was sufficient, after expenses, to meet the normal cost and interest on the unfunded accrued liability as of the beginning of the year with respect to all covered employees and (b) did not exceed the tax deduction for the year as determined in accordance with Section 404(a)1(C).

The cost factors as of the valuation date, indicated by the calculation for 2,087 active employees, 3 inactive employees with right to immediate or deferred pensions, 465 pensioners on the rolls, 1 pensioner in suspended status and 19 beneficiaries of deceased pensioners, are as follows:

Normal cost .....	\$ 826,800
Accrued liability—total .....	33,652,400
Active employees .....	\$25,052,800
Inactive employees with right to immediate or de- ferred pension .....	78,400

342a

*Defendant's Exhibit W*

Pensioners .....	8,409,300
Beneficiaries of deceased pensioners .....	111,900
 Fund .....	10,353,800
Unfunded accrued liability .....	23,298,600

The actuarial assumptions are as follows:

Mortality rates after retirement—Group Annuity Table  
for 1951 Disability rates:

<u>Age</u>	<u>Rate (%)</u>
37 .....	.1
42 .....	.1
47 .....	.2
52 .....	.6
57 .....	1.1
62 .....	3.2

Termination rates before retirement, all causes:

<u>Age</u>	<u>Rate (%)</u>
22 .....	6.0
27 .....	5.1
32 .....	4.8
37 .....	4.4
42 .....	3.9
47 .....	3.2
52 .....	1.7
57 .....	2.4
62 .....	5.1

*Defendant's Exhibit W*

Retirement age—60 for employees who complete 30 years of service before that age, 62 for employees entering employment at age 30 and 65 for all others, or completion of service requirement if later.

Interest rate—3%.

Funding method—Entry age normal cost.

On the basis of this valuation we certify that

- (a) the income reasonably expected from future employer contributions will be sufficient, after expenses, to meet the normal cost and interest on the unfunded accrued liability with respect to all covered employees; and
- (b) the assets of the fund at the expiration of the term of the collective bargaining agreement on which contributions are based will be sufficient to match the cost of prospective pensions to persons then on the pension rolls.

(Signature)

JACK M. ELKIN, A.S.A.  
Senior Vice President and Chief Actuary

Copy received July 9, 1874

Cohen, Weiss and Lewin  
Attorneys for Plaintiff

